(23,674)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 542.

GEORGE R. ROBINSON, PLAINTIFF IN ERROR,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 17, 1913.

In the Court of Appeals of the District of Columbia.

No. 2474.

GEORGE R. ROBINSON, Appellant,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation.

a Supreme Court of the District of Columbia.

At Law. No. 52878.

GEORGE R. ROBINSON, Plaintiff,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 *Declaration*

Filed August 30, 1910.

In the Supreme Court of the District of Columbia.

At Law. No. 52878.

GEORGE R. ROBINSON, Plaintiff,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation, Defendant.

First Count.

The plaintiff George R. Robinson sues the defendant The Baltimore and Ohio Railroad Company for that the said defendant is a body corporate duly created and organized as such by law, and having offices and agents for the transaction of and doing business in the City of Washington, in the District of Columbia, and for that the

defendant was, on the day and year hereinafter named, and prior thereto, and it still is such body corporate as aforesaid; and for that; on or about the tenth day of April, 1910, and for a long time prior thereto, it was, and still is a common carrier by railroad, engaged as such in the transportation of passengers and persons lawfully in and upon sleeping cars or "Pullman coaches" annexed to and forming a part of the defendant's passenger train- of cars along the several lines of railroad belonging to, or under the management or control of the defendant, and among others, upon and along the

2 defendant's certain line of railroad running from the City of Washington, District of Columbia, to the City of Wheeling, State of West Virginia, and at the time aforesaid, defendant being so engaged as aforesaid, the plaintiff, at the time aforesaid, was engaged and employed as a porter by The Pullman Company, a body corporate, upon, in, on and about a certain car known as the "Milton" belonging to said The Pullman Company, for the comfort, convenience and protection of the defendant's passengers in said car "Milton" by virtue of and in accordance with a certain agreement by and between said The Pullman Company and the said defendant, and the said Pullman car "Milton" was attached to and formed a part of a passenger train of cars of the defendant company, in accordance with said agreement between the defendant and The Pullman Company, which said train left the City of Washington, District of Columbia, on, to wit: April 9, 1910, and was bound for Wheeling, West Virginia, and other points in different States of the United States, and while the plaintiff was lawfully seated in the said car "Milton" in the due course of his employment as said porter for the comfort, convenience and protection of the passengers of the defendant in the said car "Milton", and while the defendant's said passenger train of cars, including as part thereof the said car "Milton" which was the last coach or car of said passenger train was moving between the town of Grafton, West Virginia, and the town of Fairmont, West Virginia, the said defendant, by its servants, agents and employees, did recklessly, carelessly, negligently, improperly and unlawfully, drive, move and propel another of its engines into,

3 on, upon and against the defendant's passenger train aforesaid and with great force and violence said defendant's said engine collided into and struck against said Pullman car "Milton" and defendant's said passenger train to which said car "Milton" was attached as aforesaid, which produced a rear-end collision, and said car "Milton" was destroyed, whereby and by reason of such negligence, the plaintiff was thrown violently out of his seat and against the side of the said car "Milton" or against a seat therein, or a portion of said car, and plaintiff's body thereby was and is seriously and permanently bruised, injured and wounded; and plaintiff's head struck against an object in said car which produced a knot on his head, and since said injury he has suffered and will permanently suffer from headaches; his forehead, right hand and right leg were severely cut, injured and hurt; the sight of his eyes *were* and *are* permanently impaired, and by reason of the premises, he sustained permanent injuries in his back, hips and spine, and

also sustained permanent injuries in his right leg, right knee, left hip and left leg, and by reason of said injuries and since the happening thereof, his ability to walk has been greatly impaired and he sustained permanent internal injuries to his stomach, kidneys and other permanent internal injuries, and he was and is otherwise much bruised, injured and wounded, and by reason of said injuries, he became, was and is, sick, sore, lame and disordered, and he has so remained for a long space of time, from then until now, during all of which time, plaintiff thereby suffered and underwent, and he will continue permanently to undergo great pain and mental and bodily anguish, and on account of said injuries, he was and is hindered and prevented from performing and transacting his
4 necessary affairs and business by him during that time to be performed and transacted, and he was, and still is unable to work or earn a livlihood, and his earning capacity will, in the future, be greatly and permanently impaired by reason of the said injuries, and also, the plaintiff was forced and obliged to and did necessarily pay, and contract to pay a large sum of money, to wit: $250 for medical attention, physicians' bills, and for medicines, in and about the endeavor to be cured of his said injuries, and plaintiff further says that certain wearing apparel and personal property belonged to the plaintiff, all of which he had in said car "Milton" of the total value of to wit: $102.48, was destroyed in the wreck and plaintiff wholly lost the same, all to the damage of the plaintiff in the sum of Fifteen thousand dollars.

Wherefore, plaintiff brings this suit and claims damages of the defendant in the said sum of Fifteen Thousand dollars, besides the costs of this suit.

Second Count.

The plaintiff George R. Robinson sues the defendant The Baltimore and Ohio Railroad Company for that said defendant is a body corporate, duly created and organized as such by law, and having offices and agents for the transaction of, and doing business in the City of Washington, in the District of Columbia, and that the defendant was on the day and year hereinafter mentioned, and prior thereto, and it still is such body corporate as aforesaid, and that on or about the 10th day of April, 1910, and a long time prior thereto it was, and still is, a common carrier by railroad engaged as such in the transportation of passengers and other persons for
5 hire and otherwise, upon and over a certain line of railroad, to wit: that certain line of railroad between the City of Washington, District of Columbia, and the City of Wheeling, in the State of West Virginia; and that on or about the 9th day of April, 1910, a certain passenger train of the defendant to which a certain Pullman car or coach called the "Milton" was attached, and formed a part of defendant's said passenger train, left the said City of Washington, bound for Wheeling, West Virginia and other points; and, for that, the plaintiff was then lawfully and rightfully in and upon the said Pullman car or coach "Milton", which formed a part of the defendant's train as aforesaid, which said Pullman car was under the

direction, management and control of the defendant, and the plaintiff was then being transported in the said Pullman car or coach by the defendant over and along its said line of railroad; and, while the defendant's said passenger train, which included as part thereof said Pullman car in which the plaintiff was lawfully seated, as aforesaid, which said car was the last coach or car of defendant's said passenger train, was moving between Grafton, West Virginia, and Fairmont, West Virginia, along its journey toward Wheeling, West Virginia, the defendant, by its agents, servants and employees, did recklessly, carelessly, negligently, improperly and unlawfully drive, move and propel another of its engines into, on, upon and against the defendant's passenger train aforesaid and with great force and violence defendant's said engine collided into and struck against said Pullman car "Milton" and defendant's said passenger train to which said car "Milton" was attached and formed part thereof
6 as aforesaid, which produced a rear-end collision, and said car "Milton" was destroyed, whereby and by reason of such negligence, the plaintiff was thrown violently out of his seat and against the side of the said car "Milton" or against a seat therein, or a portion of said car, and plaintiff's body thereby was and is seriously and permanently bruised, injured and wounded; and plaintiff's head struck against an object in said car which produced a knot on his head, and since said injury he has suffered and will permanently suffer from headaches; his forehead, right hand and right leg were severely cut, injured and hurt; the sight of his eyes *were* and *are* permanently impaired and by reason of the premises, he sustained permanent injuries in his back, hips and spine, and also sustained permanent injuries in his right leg, right knee, left hip and left leg, and by reason of said injuries and since the happening thereof, his ability to walk has been greatly impaired and he sustained permanent internal injuries to his stomach, kidneys and other permanent internal injuries, and he was and is otherwise much bruised, injured and wounded, and by reason of said injuries, he became, was and is sick, sore, lame and disordered, and he has so remained for a long space of time, from then until now, during all of which time, plaintiff thereby suffered and underwent, and he will continue permanently to undergo great pain and mental and bodily anguish, and on account of said injuries, he was and is hindered and prevented from performing and transacting his necessary affairs and business by him during that time to be performed and transacted, and he was, and still is unable to work or earn a
7 liv-lihood, and his earning capacity, will in the future be greatly and permanently impaired by reason of the said injuries, and also, the plaintiff was forced and obliged to and did necessarily pay, and contract to pay a large sum of money, to wit: $250, for medical attention, physicians' bills, and for medicines, in and about the endeavor to be cured of his said injuries, and plaintiff further says that certain wearing apparel and personal property belonging to the plaintiff, all of which he had in said car "Milton" of the total value of, to wit: $102.48, was destroyed in the wreck

and plaintiff wholly lost the same, all to the damage of the plaintiff in the sum of Fifteen thousand dollars.

Wherefore, plaintiff brings this suit and claims damages of the defendant in the said sum of Fifteen Thousand Dollars, ($15,000.00), besides the costs of this action.

Third Count.

The plaintiff George R. Robinson sues the defendant The Baltimore and Ohio Railroad Company for that the said defendant is a body corporate, duly created and organized as such by law, having offices and agents for the transaction of and doing business in the City of Washington, in the District of Columbia, and the defendant was, on the day and year hereinafter named, and prior thereto, and it still is such body corporate as aforesaid; and for that on or about the tenth day of April, 1910, and for a long time prior thereto, the defendant was, and it still is a common carrier by railroad engaged as such in commerce, namely, in the transportation of passengers, employés and persons lawfully in cars attached to
8 and forming a part of a passenger train of cars of defendant, under the direction, control and management of the defendant, along and upon the several lines of railroad belonging to, or under the management or control of the defendant, among others, upon and along that certain line of railroad running from the City of Washington, District of Columbia, to the City of Wheeling, in the State of West Virginia, and beyond said City and State; and for that, on or about the tenth day of April, 1910, The Pullman Company, body corporate, was the owner of certain railway cars known as drawing-room cars, parlor and sleeping cars, and the defendant was at the time aforesaid, engaged together with said Pullman Company, in a joint business by virtue of a certain contract between said named companies, whereby said The Pullman Company furnished and provided to defendant certain of its drawing-room cars, parlor and sleeping cars, which were annexed to, and then and there forming, and which formed a part of the passenger train of cars of the defendant company, for the purpose of the accommodation of the passengers of said defendant, and also other persons, including particularly the plaintiff as a porter in one of the said "Pullman cars" of the said The Pullman Company for the comfort, convenience and protection of the passengers of the said defendant, along the line of said defendant company from said City of Washington, District of Columbia, to said City of Wheeling, in the State of West Virginia, all for the mutual and joint benefit and financial interest of said defendant company and the said The Pullman Company, under their contract as aforesaid; and for that, in
9 pursuance of the said joint business of said defendant and said The Pullman Company, as aforesaid, and at the time aforesaid, the plaintiff was employed and he did perform, and he was performing the duties of a porter on one of the said "Pullman cars" to wit: known as the "Milton" which said car was annexed to and formed a part of defendant's passenger train under the contract aforesaid between the said two companies, and as such

porter on said car, the plaintiff was the common employee of said defendant and said The Pullman Company; and the said train to which said car "Milton" was attached as aforesaid, left the City of Washington, District of Columbia, on, to wit: April 9, 1910, and was bound for Wheeling, West Virginia, and other cities in different States of the United States, and while the plaintiff was so engaged as such porter, protecting the passengers of said defendant in said car "Milton" in the due course of his employment and in the proper discharge of his duties, and while he was seated in the said car "Milton" and while the defendant's passenger train to which said car "Milton" was attached as aforesaid, was moving between the town of Grafton, West Virginia, and the town of Fairmont, West Virginia, along its journey towards Wheeling, West Virginia, and without any fault whatever upon the part of the plaintiff, the defendant, by its officers, agents, servants and employees, fellow-servants of the plaintiff, did recklessly, carelessly, negligently, improperly and unlawfully drive, move and propel another of its engines into, on and upon and against said passenger train of cars, to which said car "Milton" was annexed as aforesaid, and in the rear thereof, and with great force and violence, said engine collided into and struck against said car "Milton" and defendant's said pas-
10 senger train to which said car was attached, which produced a rear-end collision and said car "Milton" was destroyed, whereby and by reason of such negligence the plaintiff was thrown violently out of his seat and against the side of the said car "Milton" or against a seat therein or a portion of said car and plaintiff's body thereby was and is seriously and permanently bruised, injured and wounded; and plaintiff's head struck against an object in said car which produced a knot on his head and since said injury he has suffered and will permanently suffer from headache; his forehead, right hand and right leg were and are severely cut, injured and hurt; the sight of his eyes were and are permanently impaired, and by reason of the premises, he sustained permanent injuries in his back, hips and spine, and also sustained permanent injuries in his right leg, right knee, left hip and left leg and by reason of said injuries, and since the happening thereof, his ability to walk has been greatly impaired and he sustained permanent internal injuries to his stomach, kidneys and other permanent internal injuries and he was and is otherwise much bruised, injured and hurt, and by reason of said injuries, he became, was and is sick, sore, lame and disordered, and he has so remained for a long space of time, from then until now, during all of which time plaintiff thereby suffered and underwent, and he will continue permanently to undergo great plain and mental and bodily anguish, and on account of said injuries, he was and is hindered and prevented from performing and transacting his necessary affairs and business, by him during that time to be performed and transacted, and he was and still is unable to work or earn a livlihood, and his earning capacity will in the future be greatly and
11 permanently impaired by reason of the happening of said injuries, and also, the plaintiff was forced and obliged to and he did necessarily pay and contract to pay a large sum of money,

to wit: $250.00, for medical attention physician's bills, and for medicines, in and about the endeavor to be cured of his said injuries, and plaintiff further says that certain wearing apparel and personal property belonging to the plaintiff, all of which he had in the said car "Milton" of the total value of, to wit: $102.48, was destroyed in the wreck and the plaintiff wholly lost the same, all to the damage of the plaintiff, in the sum of fifteen thousand Dollars. Wherefore, plaintiff brings this suit and claims damages of the defendant in the said sum of $15,000, besides costs.

LEVI H. DAVID,
ALEXANDER WOLF,
Att'ys for Plaintiff.

Plea of Not Guilty.

Filed September 29, 1910.

* * * * * * *

Now comes the defendant, and for plea to the declaration filed in the above-entitled cause, and to each count thereof, says that it is not guilty as alleged.

GEORGE E. HAMILTON,
Attorney for Defendant.

12 *Memoranda.*

September 29, 1910.—Joinder & note of Issue & notice of trial, filed.

October 21, 1910.—Leave granted defendant to file an additional plea.

Additional Plea of Defendant.

Filed October 21, 1910.

* * * * * * *

Now comes the defendant, the Baltimore and Ohio Railroad Company, leave of court being first had and obtained, and for further plea to the declaration filed herein, and to each count thereof, says:

That on, and for many years prior to the 10th day of April, 1910, it was, and had been, a corporation duly organized and existing under the laws of the State of Maryland, engaged in the operation of a railroad from the City of Baltimore, in the State of Maryland, to the City of Washington, District of Columbia, and thence through said State of Maryland into and through the State of West Virginia, to the City of Wheeling, in said State of West Virginia, its trains on said railroad being operated and run to and through the Cities of Grafton and Fairmont, in said State of West Virginia, and that it was so engaged in the operation of its trains and the moving of trains thereon on the day and date of the collision and accident referred to in the declaration and the three several counts thereof.

The defendant says that on the said 10th day of April,
13 1910, and for a long time prior thereto, it was under contract with The Pullman Company to attach to its trains, and haul as a part thereof, various sleeping and parlor cars belonging to the said The Pullman Company, of sufficient number to accommodate the needs of the passengers using the defendant's passenger trains, and to carry on each of said Pullman cars so attached to defendant's trains as aforesaid, free of charge, one or more employés of said The Pullman Company as might be necessary to collect fares for said The Pullman Company, from said railroad passengers occupying said cars, due the said The Pullman Company, for the use of seats or berths therein, and generally to wait upon and provide for the comfort of passengers therein; that on said 10th day of April, 1910, this defendant, under the terms of said contract, had attached to one of its trains running between the City of Grafton and the City of Fairmont, in the State of West Virginia, one of the sleeping cars of said The Pullman Company, known as the car "Milton" on which said car the plaintiff was riding as an employee of the said The Pullman Company as a porter at the time of the accident or collision referred to in said declaration and each count thereof, and whose duties, under his contract of employment, were that he should wait upon and provide for the comfort of passengers therein and generally to look after said car upon which he was then and there being carried under the terms and conditions of the contract between The Pullman Company and this defendant.

The defendant says that prior to the said 10th day of April, 1910, and on, to wit, the 21st day of August, 1905, the plaintiff, George
14 R. Robinson, made a voluntary application for employment to the said The Pullman Company as a Pullman car porter, and that thereupon, and after the making of said voluntary application for employment to the said The Pullman Company by said plaintiff, to wit, on the 17th day of November, 1905, a contract of employment was entered into between the said The Pullman Company and the said plaintiff Robinson, which said contract, duly subscribed by said George R. Robinson, and now here shown to the Court, consisted in part of the following undertaking, promise, agreement and release on the part of the said George R. Robinson, to be by him observed, kept and performed, to wit:

Sixth:—I will obey all rules and regulations made or to be made for the government of their own employés by the corporations or persons over whose lines of railroad the cars of said The Pullman Company may be operated while I am traveling over said lines in the employment or service of said The Pullman Company; and I expressly declare that while so traveling I shall not have the rights of a passenger with respect to such corporations or persons, which rights I do expressly renounce; and I hereby, for myself, my heirs, executors, administrators or legal representatives, forever release, acquit and discharge any and all such corporations and persons from all claims for liability of any nature or character whatsoever on account of any personal injury or death to me while in said employment or service.

I have read and understand every word of this paper.

(Signed) GEORGE R. ROBINSON. [SEAL.]

This defendant further avers that said contract of employment continued in full force and effect at all the times mentioned in the declaration filed herein, and in each count thereof, and on April 10, 1910; and that on said date, at the time of the happening of the collision, accident or injury set forth in said declaration and its seeveral counts, the said plaintiff, George R. Robinson, was an employé, servant or agent of the said The Pullman Company, under said contract hereinbefore set forth, and was connected with the said The Pullman Company, and acting for it, and about its
15 business, and was traveling upon the defendant's railroad at said time exclusively upon business of the said The Pullman Company, upon free transportation, and without the payment of fare, as aforesaid. That at the time of the collision, accident and injury set forth in the declaration, and its several counts, this defendant permitted and allowed the plaintiff to ride upon its trains, not as a passenger for hire, but on transportation furnished by this defendant, relying upon the provisions contained in said contract of employment as aforesaid; that the plaintiff knew at the time of the collision and accident set forth in the declaration and each count thereof, that his only right to be on the defendant's train was his right as an employé of the said The Pullman Company, which right he knew was secured by and under the contract between the said The Pullman Company and this defendant, and that the plaintiff volúntarily entered the employment of The Pullman Company in November, 1905, and voluntarily continued therein, and voluntarily rode on defendant's train at the time of the accident and collission set forth in the declaration and each count thereof, knowing full well that he was permitted to ride free of charge on the trains of this defendant because he was an employé, agent or servant of said The Pullman Company, and with full knowledge of the terms of his said agreement and contract of employment with the said The Pullman Company, and of which terms and conditions of said contract of employment this defendant had full knowledge; and this defendant permitted plaintiff to ride upon its trains, both before and at the time of said collision and accident, not as a passenger for hire, but as an employé of The Pullman Company, and relying upon the provisions contained in said contract of employ-
16 ment, made and entered into between The Pullman Company and the said plaintiff.

And the defendant says that by reason of the premises the plaintiff ought not to have or maintain his aforesaid action set out in said declaration and each count thereof, against this defendant.

HAMILTON, COLBERT, YERKES & HAMILTON,

Att'ys for Defendant.

Demurrer.

Filed November 14th, 1910.

* * * * * * *

The plaintiff says that the additional plea of the defendant, filed in this cause on October 21, 1910, to the plaintiff's declaration and each count thereof, is bad in substance.

ALEXANDER WOLF,
LEVI H. DAVID,
Attorneys for Plaintiff.

NOTE—The matters of law intended to be argued at the hearing of the foregoing demurrer are:

1. That the Act of Congress, entitled "An Act Relating to the liability of common carriers by railroad to their employees in certain cases," approved April 22, 1908, and particularly section 5 thereof, make void the contract, rule, regulation or device, as alleged in said plea, the purpose or intent of which was, or is, as alleged in
17 said plea, to enable the defendant, Baltimore & Ohio Railroad Company, to be exempt from liability created by said Act.

2. That said plea fails to allege that any consideration moved from the defendant, Baltimore & Ohio Railroad Company, to George R. Robinson, plaintiff, for the entering into of the alleged undertaking, promise, agreement and release referred to and mentioned in said plea and also

3. That said plea fails to allege that the alleged undertaking, promise, agreement and release was entered into between the plaintiff, George R. Robinson, and the defendant, Baltimore & Ohio Railroad Company, corporation.

4. That said plea fails to allege sufficient facts to constitute a defense to the plaintiff's declaration, or any count thereof.

Messrs. Hamilton, Colbert, Yerkes & Hamilton, Attorneys for the defendant:

Please take notice that we shall call the foregoing demurrer to the attention of the court on Friday, the 25 day of November, 1910, at the hour of ten o'clock A. M. or as soon thereafter as counsel may be heard.

ALEXANDER WOLF,
LEVI H. DAVID,
Attorneys for Plaintiff.

18 Supreme Court of the District of Columbia.

FRIDAY, *February* 17, 1911.

Session resumed pursuant to adjournment, Mr. Justice Anderson, presiding.

* * * * * * *

Upon hearing the plaintiff's demurrer filed herein to the defendant's additional plea, it is considered that said demurrer be and the same is hereby sustained, with leave to the defendant to amend said additional plea within fifteen (15) days from this date.

THURSDAY, *March* 2, 1911.

Session resumed pursuant to recess, Mr. Justice Anderson, presiding.

* * * * * * *

Upon motion of the attorneys for the defendant in open Court, it is ordered that the time granted to defendant within which to amend its additional plea in this cause, be, and it is hereby extended to and including March 20, 1911.

19 *Opinion.*

Filed March 2, 1911.

* * * * * * *

This is an action for personal injuries alleged to have been sustained by the plaintiff, George R. Robinson, on April 9, 1910, while lawfully upon the Pullman car "Milton" belonging to The Pullman Company, which at the time formed a part of a train of cars propelled, controlled, managed and operated by the defendant, The Baltimore and Ohio Railroad Co., between the City of Washington, D. C., and the City of Wheeling, W. Va., as the result of a rear-end collision with said train by another engine of the defendant through the alleged negligent, reckless, unlawful, etc. propulsion of said engine by the defendant, its agents, servants and employees.

To the declaration (which consists of three counts), the defendant has filed, in addition to the plea of the general issue, a special plea, which latter is now before the Court upon demurrer by the plaintiff as to its legal sufficiency.

The averments of this special plea, the legal sufficiency of which is the sole question now before the Court, are as follows:

(1) That at the time of the accident in question and for a long time prior thereto, the defendant was "under contract with The Pullman Company to attach to its trains, and haul as a part thereof, various sleeping and parlor cars belonging to the said The Pullman Company, of sufficient number to accommodate the needs of
20 the passengers using the defendant's passenger trains, and to carry on each of said Pullman cars so attached to defendant's

trains as aforesaid, free of charge, one or more employees of said The Pullman Company as might be necessary to collect fares for said The Pullman Company, from said railroad passengers occupying said cars, due the said The Pullman Company, for the use of seats or berths therein, and generally to wait upon and provide for the comfort of passengers therein";

(2) That the plaintiff, at the time of the accident complained of, "was riding as an employee of the said The Pullman Company as a porter * * * whose duties, under his contract of employment, were that he should wait upon and provide for the comfort of passengers therein and generally to look after said car upon which he was then and there being carried under the terms and conditions of the contract between The Pullman Company and this defendant;"

(3) That on, to wit, November 17, 1905, a contract of employment had been entered into between the plaintiff and said The Pullman Company, voluntarily subscribed by the plaintiff, and containing the following undertaking, agreement, promise and release on his part—

"Sixth. I will obey all rules and regulations made or to be made for the government of their own employees by the corporations or persons over whose lines of railroad the cars of said The Pullman Company may be operated while I am traveling over said lines in the employment or service of said The Pullman Company; and I expressly declare that while so traveling I shall not have the right of a passenger with respect to such corporations or persons, which rights I do expressly renounce; and I hereby, for myself, my heirs, executors, administrators or legal representatives, forever release, acquit and discharge any and all such corporations and persons from all claims for liability of any nature or character whatsoever on account of any personal injury or death to me while in said employment or service.

I have read and understand every word of this paper.

GEORGE R. ROBINSON. [SEAL.]"

and that, at the time of the accident complained of, the plain-
21 tiff "was an employee, servant or agent of the said The Pullman Company, under said contract hereinbefore set forth, and was connected with the said The Pullman Company, and acting for it, and about its business, and was traveling upon the defendant's railroad at said time exclusively upon business of the said The Pullman Company, upon free transportation, and without the payment of fare, as aforesaid"; and

(4) That "at the time of the collision, accident and injury set forth in the declaration, and its several counts, this defendant permitted and allowed the plaintiff to ride upon its trains, not as a passenger for hire, but on transportation furnished by this defendant, relying upon the provisions contained in said contract of employment as aforesaid."

The contention of the plaintiff in support of his demurrer is that this special plea fails to allege sufficient facts to constitute a defense

to the plaintiff's declaration, or any count thereof, for the following reasons:

1. That the plea fails to allege any consideration moving from the defendant for the alleged release.

2. That said plea fails to allege that the alleged release was entered into between the plaintiff and the defendant.

3. That the Employers' Liability Act of April 22, 1908, (35 Stat. L. 65), and particularly Par. 5 thereof, makes void the contract, rule, regulation or device, alleged in the defendant's special plea, the purpose thereof being to exempt the defendant from liability created by said Act.

22 1-2. So far as the first and second points are concerned, viz. that the plea fails to allege any consideration moving from the defendant for the alleged release, or that the same was entered into between the plaintiff and the defendant, the Court is of opinion that they are not well taken, in view of the decision of the Supreme Court of the United States in Railroad Co. v. Voigt, 176 U. S. 498. In that case, Voigt was an express messenger, injured while on an express car in a train of the railroad company, and the railroad company relied upon a similar release in Voigt's contract of employment with the express company. The Supreme Court said:

"Without enumerating and appraising all the cases respectively cited, our conclusion is that Voigt, occupying an express car as a messenger in charge of express matter, in pursuance of the contract between the companies, was not a passenger * * * ; that he was not constrained to enter into the contract whereby the railroad company was exonerated from liability to him, but entered into the same freely and voluntarily, and obtained the benefit of it by securing his appointment as such messenger; and that such a contract did not contravene public policy."

The special plea of the defendant in the case at bar is framed to come absolutely within the doctrine of this Voigt case. It follows, therefore, that the special plea of the defendant in the case at bar, so far as it sets up this contract of release as a defense, must be held to be good, unless the third point of the plaintiff be well taken, namely, that by reason of legislation subsequent to the Voigt case viz. the Employers' Liability Act of April 22, 1908, long subsequent to the Voigt decision, the contract of release dated November 17, 1905, relied upon by the defendant, was rendered null and void in so far as it purported to release or exempt the defendant from the liability sought to be enforced in this suit.

23 3. Was the contract of release dated November 17, 1905, in so far as it purported to release or exempt the defendant from the liability sought to be enforced in this suit, rendered null and void by the Employers' Liability Act of April 22, 1908 (35 Stat. L. 65)?

Said Act provides:

"That every common carrier by railroad, while engaging in commerce between any of the several States or Territories, * * * or between the District of Columbia and any of the States or Territories, * * * shall be liable in damages to any person suffering

injury while he is employed by such carrier in such commerce, * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier * * * *."

"SEC. 5. That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void:"

It is to be noted that the liability which is created by this Act is in favor of "any person suffering injury while he is employed by such carrier in such commerce." The Act does not undertake to protect persons not so employed. The question, therefore, at once arises, was the plaintiff Pullman porter, at the time of his injury, employed by the defendant within the meaning of the Act.

As this question is now presented upon demurrer by the plaintiff to the defendant's special plea, all of the facts contained in said plea which are well pleaded must be taken as true for the purposes of the demurrer, and the Court must determine whether such facts do or do not show the plaintiff to have been employed by the defendant within the meaning of the Act under consideration. What was the relation of the plaintiff to both the defendant railroad company and The Pullman Company? According to the averments of this special plea, it was that of an employee or servant of The Pullman
24 Company upon a car owned by said Company, but at the time constituting a part of the defendant railroad company's train, the plaintiff being expressly obligated in his contract with said The Pullman Company to "obey all rules and regulations made or to be made" by the defendant railroad company for the government of the latter's "own employees," and the said The Pullman Company being obligated under its contract with the defendant railroad company to furnish employees upon said car to "collect fares for said The Pullman Company, from * * * railroad passengers occupying said car * * * and generally to wait upon and provide for the comfort of passengers therein," which latter constituted the duties of the plaintiff at the time of the accident as a porter so furnished by said The Pullman Company. These are the facts from which the Court must determine whether the plaintiff was, at the time of the accident, employed by the defendant within the meaning of the said Employers' Liability Act. In the opinion of the Court, the averment in said special plea that the plaintiff was upon the defendant's railroad at the time "exclusively upon business of the said The Pullman Company," is a statement of a conclusion merely, and is dependent upon, and subject to, the specific averments of fact contained in the plea as to the relation of the plaintiff to the respective companies.

Did the relation of master and servant exist between the defendant railroad company and the plaintiff Pullman porter by reason of these facts?

In Standard Oil Co. v. Anderson, 212 U. S. 221, the Supreme Court of the United States discussed the general subject of when the relation of master and servant does and does not exist, as fol-
25 lows:

"It sometimes happens that one wishes a certain work to

be done for his benefit and neither has persons in his employ who can do it nor is willing to take such persons into his general service. He may then enter into an agreement with another. If that other furnishes him with men to do the work and places them under his exclusive control in the performance of it, those men become pro hac vice the servants of him to whom they are furnished. But, on the other hand, one may prefer to enter into an agreement with another that that other, for a consideration, shall himself perform the work, through servants of his own selection, retaining the direction and control of them. In the first case, he to whom the workmen are furnished is responsible for their negligence in the conduct of the work, because the work is his work and they are for the time his workmen. In the second case, he who agrees to furnish the completed work through servants over whom he retains control is responsible for their negligence in the conduct of it, because, though it is done for the ultimate benefit of the other, it is still in its doing his own work. To determine whether a given case falls within the one class or the other we must inquire whose is the work being performed, a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work. Here we must carefully distinguish between the authoritative direction and control, and mere suggestions as to details or the necessary co-operation, where the work furnished is part of a larger undertaking.

These principles are sustained by the great weight of authority, to which some reference will now be made. The simplest case, and that which was earliest decided, was where horses and a driver were furnished by a livery-man. In such cases the hirer, though he suggests the course of the journey and in a certain sense directs it, still does not become the master of the driver, and responsible for his negligence, unless he specifically directs or brings about the negligent act."

So that, in determining whether a particular person or corporation is liable as master for the negligence of another causing injury to a stranger, the inquiry is: Who had the authoritative direction and control of the alleged servant?

But when the injury is not to a stranger, but to someone to whom there is a special liability, as in the cases of carrier and passenger, the rule as to who are servants or employees for whose negligence the master or carrier is liable is very much broader. The Supreme Court of the United States held in Penna. R. R. Co. v. Roy,
26 102 U. S. 451, that as between carrier and passenger, in a suit by the latter against the former for injuries sustained in consequence of the falling of a berth in a car of the train, the carrier was liable, notwithstanding the particular car was in fact owned by another company (in that case the Pullman Palace Car Company) and that said company provided at its own expense a conductor and porter for such car, to whom was committed the immediate control of its interior arrangements. The Supreme Court said:

"For the purpose of the contract under which the railroad com-

pany undertook to carry Roy (its passenger) over its line and, in view of its obligation to use only cars that were adequate for safe conveyance, the sleeping-car company, its conductor and porter, were, in law, the servants and employees of the railroad company."

In the case at bar, however, the injury complained of was neither to a stranger, nor to a passenger. What was the status of the plaintiff at the time of his injury?

In Railroad Co. v. Voigt, 176 U. S. 513, already cited, the Supreme Court said, speaking of the legal relation existing between a railroad company and an express messenger employed by an Express Company and furnished under and in pursuance of a contract between the railroad company and the Express Company, as follows:

"The relation of an express messenger to the transportation company, in cases like the present one, seems to us to more nearly resemble that of an employee than that of a passenger. His position is one created by an agreement between the express company and the railroad company, adjusting the terms of a joint business—the transportation and delivery of express matter. His duties of personal control and custody of the goods and packages, if not performed by an express messenger, would have to be performed by one in the immediate service of the railroad company. And, of course, if his position was that of a common employee of both companies he could not recover for injuries caused, as would appear to have been
27 the present case, by the negligence of fellow-servants."

In the later case of O'Brien v. Chicago &c. Ry., 116 Fed. 502 (decided June 23, 1902 by the Circuit Court for the Northern District of Iowa), Mr. Justice Shiras had before him a case involving the liability of a railroad company to an express messenger, arising under the Employers' Liability Act of Iowa, which Act provided:

"Every corporation operating a railway shall be liable for all damages sustained by any person, including employees of such corporations, in consequence of the neglect of the agents, or by any mismanagement of the engineers or other employees thereof * * *."

"No contract, receipt, rule or regulation shall exempt any railway corporation engaged in transporting persons or property from the liability of a common carrier or carrier of passengers, which would exist had no contract, receipt, rule or regulation been made or entered into."

And he held, following the principles laid down in the Voigt case, in the light of the new provisions of law engrafted by said Employers' Liability Act of Iowa, that the defendant railroad company could not escape liability either because of the fact that the plaintiff was a fellow-servant, or because the plaintiff had executed a contract of release, since the Act expressly abolished both kinds of defenses, and the plaintiff was a person of the class entitled to the benefits of the Act.

So, in the case at bar, in the judgment of the Court, the defendant railroad company cannot escape liability either because of the fact that the plaintiff was a fellow-servant, or because he had executed a

contract of release, since the Act here under consideration expressly abolished both kinds of defenses, and the plaintiff belongs to the class of persons entitled to the benefits of the Act within its true intent and meaning, as the Court interprets the Act. If, as was said by the Supreme Court in the Voigt case, an express messenger is an em-
ployee of a railroad company in consequence of the joint
28 business conducted by the railroad company and the express company, the same must certainly be true of a Pullman porter, in consequence of the joint business conducted by the defendant railroad company and the Pullman Company.

Not only so, but every passenger on the defendant's train was a passenger of the defendant, whether riding in its own cars or in the cars of the Pullman Company. For those preferring to ride in the cars of the Pullman Company, that Company was bound, under its contract with the defendant company, to furnish the necessary cars for the purpose, to be hauled as a part of the defendant's train, and likewise the necessary number of porters "to wait upon and provivde for the comfort" of the defendant's passengers riding in said Pullman cars. Moreover, as appears from the special plea of the defendant now under consideration, the plaintiff was bound, by the terms of his contract of employment with the Pullman Company of November 17, 1905, to—

"obey all rules and regulations made or to be made for the government of their own employees by the corporations or persons over whose lines of railroad the cars of said The Pullman Company may be operated."

The Court is of the opinion that the language used by Congress in the Act under consideration, namely, "any person suffering injury while he is employed," was not used in any narrow sense, but that it was intended to cover every employee within the broad interpretation put upon that term by the Supreme Court in the Voigt case. Any other construction would subject the plaintiff and all other
servants and employees similarly situated to the same hazards
29 and dangers of interstate commerce as are other employees and servants of the carrier, without affording them the same protection against the negligence of their fellow employees. Evidently it was the purpose of Congress to thus provide against any attempted evasion of liability under the Act by the carrier, through any existing or subsequent contract, rule, regulation or device that might be invoked for that purpose. The statute, in effect, declares or establishes a rule of public policy in respect to interstate transportation by common carriers by railroad, and hence no pre-existing contractural obligation or device, as well as none subsequent to the passage of the Act, can be invoked to defeat this absolute right of the person so injured to maintain a civil suit for damages against such carrier.

Manifestly, it is the plain purpose of the Act to place all persons so employed under its protection, and to deny to the carrier the exemption from liability that would otherwise remain to him under pre-existing contracts of this character as well as to deprive such carrier of its pre-existing common law right to interpose the fellow-

servant doctrine as a defense. This, as it seems to the Court, is in harmony with the chief purpose of the Act itself, and is indeed an essential condition to carrying out its salutary purpose, viz: the promotion of the safety and efficiency of interstate commerce that must naturally result from this added responsibility of the carrier toward its servants and employees, and the increased protection of the latter in carrying on such commerce. This certainty of liability and consequent certainty of protection are the means employed to
30 effect this salutary purpose.

So that, while at the common law this contract of release would be valid, it is not so, in the opinion of the Court, under the Employers' Liability Act of April 22, 1908 now under consideration. The Act is clearly intended to prohibit pre-existing contractual obligations or devices, as well as those subsequent to the passage of the Act, from being invoked to defeat the absolute right of the person injured to maintain a civil suit for damages against the carrier, as already stated. It is, however, contended on behalf of the defendant that the Act should not be given effect so as to interfere with any pre-existing contractual obligations or devices, because, to do so, would be to impair the obligation of contracts, and, therefore, it is argued that in no event can the release relied upon by the defendant in this case be barred as a defense. No authority has been cited by the defendant in support of this last proposition, and the Court has been unable to find any. On the contrary, the Supreme Court of the United States has expressly decided that the provision of the Constitution prohibiting the States from enacting laws impairing the obligation of contracts does not apply to the United States. Satterlee v. Matthewson, 2 Pet. 380, 416. Legal Tender Cases, 12 Wall., 475, 550. Of course, Congress is prohibited by the Fifth Amendment to the Constitution from depriving persons or corporations of property without due process of law, Sinking Fund Cases, 99 U. S. 700. But the Employers' Liability Act under consideration manifestly does not undertake to do that, and it is not so contended.

31 It follows from what has already been said that the plaintiff is entitled to the benefit and protection of the provisions contained in the Employers' Liability Act of 1908, and, therefore, under the express provisions of said Act, the release pleaded by the defendant herein, in so far as it purports to exempt or relieve the defendant from liability, is void.

The Court has considered the case of Denver &c. R. Co. v. Whan (decided by the Supreme Court of Colorado), 11 L. R. A. (New Series) 433, cited on behalf of the defendant upon the main question of whether the plaintiff should be treated as an employee of the defendant within the meaning of the Act under consideration, but does not deem it decisive of the case at bar, both because not involving the particular Act here under consideration and because the Federal decisions already referred to are necessarily entitled to grater weight.

For the reasons stated, the demurerr to the defendant's special plea is sustained.

THOS. H. ANDERSON, *Justice.*

32 *Motion to Produce Papers.*

Filed March 4, 1912.

* * * * * * *

Now comes the plaintiff, by his attorneys, Alexander Wolf and Levi H. David, and moves the Court to pass an order herein, requiring the defendant, The Baltimore and Ohio Railroad Company, to produce and to file in the office of the Clerk of this Court, for inspection by the plaintiff or his counsel, on or before a day certain to be named in the said order, and before the trial of this case, the following records, papers and memoranda, to wit:

1. The records and papers made, entered or kept by the defendant, by its agents and employés, on April 9, 1910, and April 10, 1910, in defendant's train despatcher's office at Wheeling, West Virginia, commonly called the "train despatcher's record of train orders issued" by the Baltimore and Ohio Railroad Company, containing telegraphic instructions given to certain of said defendant's employés engaged in the running of defendant's passenger train known as No. 7, on its way from Washington, D. C., to Wheeling, West Virginia, on April 9-10, 1910, which said telegraphic instructions were sent from defendant's train despatcher's office at Wheeling, West Virginia, to defendant's telegraph operator at Grafton, West Virginia, and by him delivered to the conductor and engineer, or either of them, in charge of defendant's said passenger train No. 7, on April 9-10, upon its arrival at Grafton, West Virginia; and

2. Also the records and papers made by the telegraph
33 operator of the defendant company, at Grafton, West Virginia, on April 9-10, relating to the orders for the running of defendant's said passenger train No. 7, passing through Grafton, West Virginia, on its way from Washington, D. C. to Wheeling, West Virginia, on April 9-10, 1910, and the written evidence of the receipt, of said telegraphic instructions, by the engineer and conductor, or either of them, in charge of said passenger train No. 7; and also

3. The records and papers made on April 9-10, 1910, by defendant company, by its agents or servants, in its despatcher's office at Wheeling, West Virginia, covering the movement of said passenger train No. 7, running from Grafton, West Virginia, to Wheeling, West Virginia, and also covering the movements of an "extra" train No. 2610, of defendant company, running between, to wit: Grafton, West Virginia, and Fairmont, West Virginia, and the record showing "clearance order" given to the engineer and conductor, or either of them, of said "extra" train, at Grafton, West Virginia, on April 9-10, 1910; and

4. Also the written agreement and contract executed and delivered by and between said Baltimore and Ohio Railroad Company, corporation, and The Pullman Company, corporation, in force priod to, and on April 9–10, 1910, by the terms whereof, said Baltimore and Ohio Railroad Company attached to its trains, and hauled as a

part thereof, various sleeping and parlor cars belonging to the said The Pullman Company, of sufficient number to accommodate the needs of the passengers using the passenger trains of the Baltimore and Ohio trains.

The affidavit of the plaintiff, George R. Robinson,
34 is hereto annexed and is hereby prayed to be read and considered as a part of, and in connection with, this motion.

ALEXANDER WOLF,
LEVI H. DAVID,
Attorneys for Plaintiff.

Messrs. Hamilton, Yerkes & Hamilton, Attorneys for Defendant:

Please take notice that we will call the foregoing motion to the attention of the court, for action thereon, on Friday, the 8th day of March, 1912, at 10 A. M., or as soon thereafter as counsel may be heard.

ALEXANDER WOLF,
LEVI H. DAVID,
Attorneys for Plaintiff.

Service of the foregoing motion, notice and affidavit is hereby acknowledged this 4th day of March, 1912.

HAMILTON, YERKES & HAMILTON,
E. B.,
Attorneys for Defendant.

* * * * * * *

Affidavit.

DISTRICT OF COLUMBIA, *ss:*

I, George R. Robinson, being first duly sworn, on oath depose and say, that I am the person named as plaintiff in the above entitled cause, in which the Baltimore & Ohio Railroad Company, a corporation, is defendant; that during the month of April, 1910, I was employed in the capacity of a porter on a Pullman car attached to and forming a part of passenger train known as No. 7 of the defendant, running between Washington, D. C., and Wheeling, West Virginia, and my duties, as such porter, were to accommodate the needs of the passengers of the defendant, the Baltimore & Ohio Rail-
35 road Company, who were in the Pullman car aforesaid, under and by virtue of a written contract between the said Baltimore & Ohio Railroad Company and The Pullman Company which said contract is in the possession of said defendant Railroad Company.

That on the night of April 9–10, 1910, said train passed through Grafton, West Virginia, and according to the rules of said defendant company, its agents made certain records of the time of arrival and departure of said train, and also certain train orders were delivered by the defendant, by its agents, to the conductor and engineer of said train No. 7, directing said conductor and engineer concerning the movement of said train between Grafton and the "Wickwire Bridge" which is four or five miles west of said Grafton.

I further say that I am informed and believe that an engine of the defendant, known as No. 2610, left Grafton on said night of April 9–10, 1910, bound west, and an order known as a "Clearance Card" was delivered to the engineer of said engine at Grafton, West Virginia, and another "Clearance Card" of like kind was given to said engineer at a station called Fetterman, West Virginia, which said "Clearance Cards" were instructions to the engineer of said engine No. 2610 to run said engine west of said Fetterman; and that copies of said "Clearance Cards" were made by the defendant Company, by its agent, and are now in the possession of the defendant.

I further say that I am informed and believe that the train despatcher of the defendant Company made a record of the
36 movement of said trains Nos. 7, and 2610, respectively, and noted the exact time each of said trains passed each telegraph office of the defendant Company, located between Grafton, West Virginia, Fetterman, West Virginia, and the Wickwire Bridge."

I further say that I am informed and believe that said defendant Company has in its possession each and every record and paper mentioned herein, namely, the record and copies of each and every train order, "Clearance Card," the record of the exact time and times when said trains Nos. 7 and 2610, passed said Grafton and Fetterman, and that the train despatcher's train sheet of the Wheeling Division of the Baltimore & Ohio Railroad Company will show the time said trains passed said Grafton and Fetterman, and that the train despatcher's record of train orders issued on the Wheeling Division from said train despatcher's office of Wheeling, West Virginia, will show that said train orders were issued, and that the copies kept by the telegraph operators of the defendant at said Grafton and Fetterman will show that said train orders and "Clearances" were delivered to the conductors and engineers of said trains Nos. 7 and 2610, respectively, and will also show the signatures of said engineers and conductors signed in duplicate on the copies kept by said telegraph operators of defendant Company, at said Grafton and Fetterman on the night of April 9–10, 1910.

I further say that each and every record and paper referred to in this affidavit and in my motion to produce is necessary to prove my case, and the defendant can produce the same when required by the Court to do so.

GEORGE R. ROBINSON.

37 Subscribed and sworn to before me this 4 day of March, 1912.

GEORGE W. OFFUTT,
Notary Public, D. C.

Supreme Court of the District of Columbia.

FRIDAY, *March 22nd*, 1912.

Session resumed pursuant to adjournment, Hon. Ashley M. Gould, Justice, presiding.

* * * * * * *

Upon consideration of plaintiff's motion herein, to require defendant to produce papers, it is ordered that said motion be, and the same is hereby granted and the defendant is ordered to produce at the trial of this cause, the papers and documents in said motion specified.

Memorandum.

June 10, 1912.—Jury sworn and respited.

38 *Stipulation.*

Filed June 10, 1912.

* * * * * * *

It is this 7th day of June, 1912, agreed and stipulated between counsel for plaintiff and counsel for defendant herein as follows:

1st. That printed copy of agreement between the Pullman Company and the Baltimore and Ohio Railroad Company, of date January 1, 1907, No. 668, and marked "A," may be offered and used in this case as testimony or evidence the same as if it were the original contract, and proof of all signatures waived.

2nd. That copy of the application for employment as porter, made to the Pullman Company by plaintiff Robinson in August, 1905, and marked "B" may be offered and if admitted used as evidence as if the same were the original application, and proof of signatures in said application waived; this paper to have the same effect as the original with signatures proved, plaintiff reserving all rights to object and except to this paper because of incompetence or irrelevancy.

3rd. That a copy of the contract of employment, marked "C," entered into between the Pullman Company and plaintiff on November 17, 1905, may be offered and used if admitted used the same as if it were the original contract, evidence as to signatures of parties thereto being waived. Plaintiff reserves the same right and privilege to object and except to the introduction of this paper, as re-

39 served in clause 2 hereof.

LEVI H. DAVID,
Counsel for Plaintiff.
JOHN W. YERKES,
Counsel for Defendant.

Memorandum.

June 11, 1912.—Verdict for Defendant.

40 *Motion for New Trial.*

Filed June 15, 1912.

* * * * * * *

Now comes the plaintiff and moves the Court to enter an order in this cause, setting aside the verdict of the jury herein and granting a new trial, on the following grounds, to wit:

1. Because the verdict is contrary to the evidence.
2. Because the verdict is contrary to the weight of the evidence.
3. Because the verdict is contrary to law.
4. The Court erred in instructing the jury at the conclusion of plaintiff's testimony, over the objection and exception of the plaintiff, to render a verdict in favor of the defendant, because the testimony of the plaintiff showed that, at the time the plaintiff sustained the injuries complained of in the declaration, by the negligence of the defendant, its agents and servants, the defendant was a common carrier by railroad, engaged in inter-state-commerce, and said injuries occurred to plaintiff, while he was employed by the defendant in such commerce, and that said testimony showed the plaintiff to be an employé of the defendant at said time within the meaning of the Employers' Liability Act, approved April 22, 1908, and under said Act the plaintiff was entitled to recover in this cause.
5. The court erred in ruling, as a matter of law, over the objection and exception of the plaintiff, that the plaintiff's testimony failed to show that he was entitled to have his case submitted

41 to the jury.

6. The Court committed error of law in admitting in evidence, over the objection and exception of the plaintiff, the written contract of employment between the Pullman Company and George R. Robinson, dated November 17, 1905, containing an alleged release to and discharge of any and all corporations from all claims for liability on account of any personal injury said George R. Robinson might sustain while he traveled in a Pullman car annexed to a railroad car, for the reasons that (*a*) As shown by the record in this cause, the defendant Company pleaded the said alleged release, and the plaintiff demurred thereto, and after consideration thereof by the Court, the said demurrer was sustained as to said plea, as appears by the order of this Court;

(*b*) Because the undisputed testimony of the plaintiff showed that at the date of said alleged release, to wit: November 17, 1905, up to 1908, the plaintiff was an "extra" porter of the Pullman Company, and between November 17, 1905 and 1908, the plaintiff received a salary of Twenty-five ($25.) dollars per month; and in 1908, plaintiff was promoted to the position of porter in charge with a regular run between Washington, D. C., and Wheeling, W. Va., at an increased compensation, to wit: Forty ($40) dollars per month, and from said 1908, up to and including date of the happening of the injuries to plaintiff, to wit: April 10, 1910, plaintiff was such porter in charge, and as such, one of the duties performed by plaintiff, and accepted by the defendant, was the collection by plain-

tiff of railroad transportation for and on behalf of the de-
42 fendant company; the court erred in not holding that, by reason of the advanced position and promotion of plaintiff, carrying increased compensation to plaintiff, the said alleged release dated November 17, 1905, was non-effective and unenforcible in this case.

(*c*) Because said alleged release was improperly admitted in evidence under the general issue plea of defendant.

(*d*) Because the court allowed the defendant to offer said alleged release as a part of the plaintiff's case in chief.

ALEXANDER WOLF,
LEVI H. DAVID,
Attorneys for Plaintiff.

Messrs. Hamilton, Yerkes and Hamilton, Attorneys for Defendant:

Please take notice that we will call the foregoing motion to the attention of the Court for argument thereon, on Friday, June 21, 1912, at 10 A. M., or as soon thereafter as counsel may be heard.

ALEXANDER WOLF,
LEVI H. DAVID,
Attorneys for Plaintiff.

Service of foregoing motion, notice, and copy thereof, is hereby acknowledged this 15 day of June, 1912.

JOHN W. YERKES,
Attorneys for Defendant.

43 Supreme Court of the District of Columbia.

FRIDAY, *June 21st*, 1912.

Session resumed pursuant to adjournment, Hon. Ashley M. Gould, Justice presiding.

* * * * * * *

Upon consideration of the motion for a new trial filed herein on behalf of the plaintiff by his attorneys of record, it is ordered that said motion be, and the same is hereby overruled and judgment on verdict is ordered. Wherefore, it is considered, that the plaintiff herein take nothing by this action, that the defendant go hence without day, be for nothing held and recover of plaintiff its costs of defense to be taxed by the clerk, and have execution thereof.

From the foregoing the plaintiff by his attorney in open court, notes an appeal to the Court of Appeals, whereupon, the penalty of a bond for costs is hereby fixed in the sum of One Hundred Dollars.

Order for Appeal.

Filed June 21, 1912.

* * * * * * *

The Clerk of said Court will please note an appeal on behalf of the plaintiff to the Court of Appeals of the District of Columbia, from the judgment entered herein & issue citation to the defendant.

ALEXANDER WOLF,
LEVI H. DAVID,
Attorney- for Plaintiff.

44 In the Supreme Court of the District of Columbia.

At Law. No. 52878.

GEORGE R. ROBINSON
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation.

The President of the United States to The Baltimore and Ohio Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein, under and as directed by the Rules of said Court, pursuant to an Appeal noted and filed in The Supreme Court of the District of Columbia, on the 21st day of June, 1912, wherein George R. Robinson is Appellant, and you are Appellee, to show cause, if any there be, why the Judgment rendered against the said Appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Harry M. Clabaugh, Chief Justice of the Supreme Court of the District of Columbia, this 21st day of June in the year of our Lord one thousand nine hundred and twelve.

JOHN R. YOUNG, *Clerk*.
By A. W. LEVENSALER,
Ass't Clk.

Service of the above Citation accepted this 22 day of June, 1912.

HAMILTON, YERKES & HAMILTON.
Attorneys for Appellee.

44½ [Endorsed:] 14. No. 52878. Law. George R. Robinson vs. The Baltimore and Ohio Railroad Company. Citation. Issued June 21", 1912. Service accepted by defendant. Clerk, please file. Levi H. David, Alexander Wolf, Attorneys for Appellant.

45 *Memoranda.*

July 5, 1912.—Appeal bond approved and filed.

July 11, 1912.—Bill of Exceptions submitted.

July 29, 1912.—Time to settle exceptions and file record extended to August 17, 1912, inclusive.

August 5, 1912.—Time to settle exceptions extended to August 27, 1912 and to file record to September 16, 1912 inclusive.

August 22, 1912.—Time to settle exceptions extended to September 20, 1912 and to file record to October 21, 1912, inclusive.

Supreme Court of the District of Columbia.

WEDNESDAY, *August 28th*, 1912.

Session resumed pursuant to adjournment Hon. Ashley M. Gould, Justice presiding.

* * * * * * *

The Court having this 28th day of August 1912, signed the Bill of Exceptions, taken at the trial of the cause, and heretofore submitted, now orders the same of record nunc pro tunc.

46 *Bill of Exceptions.*

Filed August 28, 1912.

* * * * * * *

Be it remembered that the above entitled cause came on for trial on June 10, 1912, before Mr. Justice Gould and a jury. Messrs. Alexander Wolf and Levi H. David appeared as counsel for the plaintiff, and Messrs. John W. Yerkes and John J. Hamilton as counsel for the defendant.

That to maintain the issues on his part joined, the plaintiff, GEORGE R. ROBINSON, colored, was produced as a witness in his own behalf, and after being duly sworn, testified; that his name was George R. Robinson; resides at 304 V St., N. W.; that on April 9, 1910, he was a Pullman porter and had been such porter since November 17, 1905; that on April 9, 1910, his run was from Washington, D. C. to Wheeling, West Virginia. His train was No. 7; left Washington at 5:30 p. m. and was due to arrive in Wheeling, West Virginia at 5:35 a. m.; that his duties as a Pullman porter on that train were to collect Pullman transportation and railroad transportation and provide for the comfort of passengers such as making berths and other necessary things for the comfort of passengers; that his salary was $40. a month;

Thereupon plaintiff introduced in evidence the written agreement between the Baltimore & Ohio Railroad Company and the Pullman Company, dated January 1, 1907, in force at the time of the happening of the accident in this case, said agreement was produced by the defendant company, pursuant to the order of the Court, on motion of the plaintiff herein.

47 Said agreement was received in evidence and is as follows:

"Agreement."

"This Agreement, Made the First day of January, A. D. 1907, between The Pullman Company, party of the one part, and The Baltimore and Ohio Railroad Company, hereinafter called the Railroad Company, party of the other part, witnesseth that:

SECTION 1. The Pullman Company shall furnish sleeping and parlor cars properly equipped and acceptable to the Railroad Company, sufficient, in the judgment of the General Manager or Superintended of the Railroad Company to meet the requirements of travel over the lines of railroads now owned or controlled by the Railroad Company, and over all additional railroads which it shall hereafter own or control.

In case the Railroad Company shall at any time desire to operate its own parlor cars and café cars, either exclusively or in addition to parlor cars furnished by The Pullman Company, it shall have the right to do so.

SECTION 2. The Pullman Company, except as hereinafter provided, shall keep all such cars in good order and repair, and shall renew and improve the same so far as may be necessary to keep them up to the standard of such cars furnished by The Pullman Company for use on competing lines.

SECTION 3. The Pullman Company shall have the right to collect from the occupants of Pullman cars, for the use of seats and berths therein, such fares as are customary on competing lines of railroad where equal accommodations are furnished, and shall provide the necessary employés, who shall be subject to the rules of the Railroad Company governing its own employees.

48 The Pullman Company, in order to maintain service acceptable to the Railroad Company and the traveling public, shall furnish agents or inspectors to supervise the conduct of employés cleanliness of cars, etc., while en route, and the Railroad Company will transport free over its own lines the employés, agents or inspectors mentioned in this section.

SECTION 4. The Railroad Company shall pay to the Pullman Company the cost of repairing and making good all damages to any of its cars resulting from accident or casualty or fire on the lines of the Railroad Company, and on any other roads with which The Pullman Company has no operating contract upon which any such cars may be run by direction of the Railroad Company, except damages resulting from accident or casualty or fire originating inside of said cars, or from the negligence of the employés of the Pullman Company in the line of their employment. Where damage from accident or casualty or fire, for which the Railroad Company is responsible, is repaired by The Pullman Company, bills shall be rendered to the Railroad Company for the cost of such work with an addition of ten per cent (10%).

SECTION 5. The Railroad Company shall promptly make such repairs as may be necessary to put any of such cars in good order whenever requested by The Pullman Company so to do, and shall, without request, make such repairs as may be required at any time

to insure the safety of such cars, and shall at the end of each month render therefor to The Pullman Company bills for the cost of such repairs with an addition of ten per cent (10%), except as provided for in Section 4 hereof.

SECTION 6. The Railroad Company shall furnish free of
49 charge at convenient points rooms and necessary facilities for airing and storing bedding, linen, supplies and other movables belonging to or designed for the use of such cars, and shall wash and clean the outside of such cars, and shall furnish and apply necessary lubricating material, ice, water, and materials for heating and lighting.

SECTION 7. The Railroad Company shall require its ticket agents, at such offices as may be mutually agreed upon, to sell tickets for seats and berths in such cars without charge to The Pullman Company, the proceeds of such sales to be at the risk of The Pullman Company.

SECTION 8. Each of the parties hereto shall, so far as they lawfully may, furnish free passes to the general and division officers of the other for use on all the lines operated under this contract.

SECTION 9. If any of The Pullman Company's employés furnished with any of its sleeping or parlor cars operated under this agreement shall be injured or killed in consequence of a railroad accident or casualty when serving in the line of his duties, the Railroad Company shall save harmless The Pullman Company from damages, cost and expenses growing out of or incident to such injury or death, to the extent that the Railroad Company would be liable if such employé were in fact an employé of the Railroad Company when so injured or killed, and The Pullman Company shall save harmless the Railroad Company from such damages, costs and expenses to any greater extent, each party to have immediate notice from the other of any claim or suit for any injury or death, and the right to resist or defend such claim or suit.

50 SECTION 10. The Pullman Company will indemnify the Railroad Company against all costs, charges and expenses incidental to any claims for infringement of patent rights in the construction and use of any of the cars and their appliances which may be furnished and used by The Pullman Company upon the roads of the Railroad Company under this agreement. It is, however, expressly agreed that the Railroad Company will provide lawful right to use patents for such running gear, platforms, brakes, etc., on the said cars as it may specially order to be attached thereto for the purpose of conforming with its standards, where appliances are protected by patents and The Pullman Company has no authority for their use; and the Railroad Company shall in every such case fully indemnify said The Pullman Company against any and all claims, suits, costs, charges and expenses it may suffer or sustain by reason of infringement in such use. The party entitled to indemnify in any matter covered by this Section shall give to the other party immediate notice of any claim or suit thereon with opportunity to defend.

SECTION 11. The Railroad Company shall have the right to co-

operate with other railroad companies in forming through or continuous lines of sleeping and parlor car service, and The Pullman Company shall have the right to furnish its pro rata of sleeping and parlor cars for service in such through or continuous lines based upon the mileage of the Railroad Company in said lines, and shall be entitled to receive all local fares for the use of seats and berths therein upon the roads of the Railroad Company, and its pro rata of through and intermediate fares based upon the proportionate mileage of the road or roads covered by this agreement in such through or continuous lines.

SECTION 12. The Railroad Company shall haul the cars furnished by The Pullman Company under this agreement on its passenger trains in such manner as may be necessary to meet the requirements of travel over the railroads now owned or controlled by the Railroad Company.

The Railroad Company shall haul over its lines, without charge to The Pullman Company, the cars furnished under this agreement, both to and from repair shops, and to and from such other points as may be necessary for the purpose of this agreement.

The Railroad Company shall not be entitled to receive compensation from The Pullman Company for the movement of cars furnished under this agreement, and The Pullman Company shall not be entitled to receive compensation from the Railroad Company for the use thereof.

SECTION 13. Whenever the gross revenue from sales of seats and berths in all the standard sleeping and parlor cars furnished under this agreement shall exceed an average of seven thousand seven hundred and fifty dollars ($7,750) per car per annum, The Pullman Company shall pay to the Railroad Company one-half of such excess over seven thousand seven hundred and fifty dollars ($7,750.)

SECTION 14. If by reason of competition or legislation or other cause beyond the control of The Pullman Company, the average gross revenue of all the standard sleeping and parlor cars operated under this agreement shall be less than an average of six thou-
52 sand dollars ($6,000.) per car per annum and continue at such rate for two consecutive years, The Pullman Company shall have the right upon twelve (12) months' written notice, to terminate this agreement; but, in such event, the Railroad Company shall have the option of paying to The Pullman Company such sum as will with the gross revenue derived from the sale of seats and berths equal six thousand dollars ($6,000.) per car per annum, during the life of this contract, or to purchase the cars then upon its lines under this agreement at a price to be determined. In case the Railroad Company should under the provisions of this Section, purchase the cars, The Pullman Company will, in case it has facilities for doing so, assist the Railroad Company in repairing the cars or building new cars when so desired; such work to be done at the Railroad Company's own expense, and upon such terms as may be mutually agreed upon.

SECTION 15. In determining the average number of cars furnished by The Pullman Company and the average gross revenue for

the purposes of this agreement, the actual days' service of all cars plus twenty per centum (20%) for shippage and idle time, shall be divided by three hundred and sixty-five (365), thus giving the average number of cars, and the aggregate gross revenue shall be divided by the average number of cars so obtained, the result being the average gross revenue per car per annum upon the whole number of cars.

It is mutually understood that the Pullman Company will at the end of each contract year, furnish the Railroad Company a statement showing the average earnings per car per annum of the cars furnished under this agreement, and it is understood and agreed that the Railroad Company shall have the right to verify
53 such statements by the accounts of The Pullman Company.

SECTION 16. The Pullman Company shall have the exclusive right, so far as the same may lawfully be granted by the Railroad Company, to furnish under this agreement all standard sleeping and parlor cars for use on all the lines of railroad owned or in any way controlled by the Railroad Company for the term commencing on the First day of January, A. D. 1907, and ending on the First day of January, A. D. 1927, unless the same shall be sooner terminated by the mutual agreement of the parties hereto.

In consideration of the execution and delivery of this agreement and the mutual covenant hereby expressed, it is understodd and agreed that either party may cancel and terminate the said agreement by giving at any time after the expiration of fourteeen years from the date thereof three years' notice of its intention to cancel and terminate the same.

SECTION 17. This agreement supersedes the agreement between the parties hereto of January 1, 1902.

In Witness Whereof, the parties hereto have signed, sealed and delivered these presents the day and year first herein written.

THE PULLMAN COMPANY,
[SEAL.] By ROBERT T. LINCOLN, *President.*

Attest:
A. S. WEINSHEIMER, *Secretary.*

THE BALTIMORE AND OHIO RAILROAD COMPANY,
[SEAL.] By OSACAR G. MURPHY, *President.*

Attest:
C. W. WOOLFORD, *Secretary.*

54 That the examination of the plaintiff continued:

Q. You say that your duties were, among other things, to collect fares. Fares for whom? A. The Baltimore & Ohio Railroad Company and the Pullman Company.

Plaintiff further testified that on April 9, 1910, there were three Pullman coaches annexed to this B. & O. Railroad train; that wit-

ness was in the rear coach, called "The Milton"; that the sleeper immediately in front of "The Milton" was bound for Columbus, Ohio, to be switched off at Benwood Junction, about five miles from Wheeling, W. Va.; that when witness would get to Wheeling, on his run, he would come back the same evening leaving Wheeling — 5 o'clock p. m.; that he made two trips and *and* a third a week; he would lay over every third day; that on the trip in question, his train reached a station known as Grafton, W. Va. about thirteen minutes late; it was due there 1:47 a. m., but arrived in Grafton about 2 o'clock; upon its arrival there, train stopped and witness saw the conductor get off with his lantern; the engineer also got off. They went into the operator's office of the B. & O.; the flagman also passed witness and went down, to get his orders. They then returned to the train. This was usual. The telegraph office is about thirty feet from the station; flagman's name was Crist; they went to the operator's office to receive their train orders—with respect to the movement of No. 7. Witness did not see any orders, when the train stopped at Grafton witness got down with his stepping box to receive
55 passengers that might want accommodation, that being part of his regular duties. No passengers got on at Grafton; train stopped at Grafton about four or five minutes; it left Grafton about 2:04 or 2:05 a. m.; upon leaving Grafton Mr. Crist, the flagman, of No. 7, and witness sat in opposite berths in "The Milton", that were not made down; the train proceeded towards Fairmont, W. Va. We rode about a mile or a mile and a half. The train made a sudden slow-down, very suddenly. You could feel it from the action of the brakes. When it slowed down witness leaned over towards the right and asked the flagman—(counsel for the defendant objected) and witness continued: that the flagman replied to witness's question. Witness further testified that shortly after the train had gone about a quarter of a mile the collision occurred; that Fetterman is the next station after Grafton; that Fetterman is about two miles from Grafton; that there are stations between Grafton, W. Va. and Fairmont, W. Va., but the train never stopped between those points; Valley Falls is about seven miles from Fetterman; Wickwire Bridge is about four and a half miles from Fetterman; the train was about two miles and a quarter from Grafton when the collision occurred; train No. 7 proceeded as far as Fetterman, beyond Fetterman, just about the same rate of speed they usually ran, then the train began to slow down; the slowing-down of No. 7 was for about a quarter of a mile or a half of a mile; when the train slowed down and had run about a half a mile, witness heard a sound like a clap of thunder; he turned to ask what had happened and was thrown into a very dark place. His feet were wedged in. There was coal gas, gas from the car, coal dust, hot cinders and witness
was almost suffocated in this dark place. Witness fell back
56 and made an attempt to get out a number of times, but his feet being wedged in, he could not get the use of his limbs. Finally, he was successful in releasing his feet. He had on low shoes and he succeeded in pulling his feet out of the place that was closed in, pulling himself out of the hole, and pulling his feet

out of his low quarter shoes; some one assisted witness out of this hole. An engine and a cab of the B. & O. Railroad Company ran into "The Milton". Before the collision, witness saw that engine and cab of the B. & O. Railroad standing on a siding, or side-track at Fetterman; his passenger train No. 7 passed that engine and cab, while it was standing; the next time witness saw said engine and cab, it was buried in his car "Milton"; the accident happened about two miles and a quarter beyond Grafton; and about three quarters of a mile from Fetterman; the rear end of the "Milton" was smashed in, by the collision, in fact, the car burnt up. There was a light blaze in it when I got out; the flagman, Crist, who was sitting opposite to me was killed; that the porters of the cars bound for Chicago and Columbus, assisted me in the Chicago car, which was the third car from the coach; they helped witness to the porter's berth but he was not comfortable there, so he got up and sat in a chair in the smoker. The train proceeded to Fairmont, W. Va., where an ambulance met the train. Two physicians took me up to the ambulance; a man in the ambulance objected to my riding inside so they decided to put me up on the front seat with the driver. I was carried to the hospital in Fairmont. Witness was injured in his back, and immediately lamed in his right leg; he was cut
57 on the hand, bruised on his face, had a knot on his head; suffered the greatest amount of pain, most of it being in witness's back and right leg; the next day, they brought witness in a carriage and after being assisted to the train, he returned to Washington; upon his arrival in Washington, his wife met him at the station, a cab was secured and witness was conveyed to his home; he remained in bed five weeks. Drs. Tyler and Curtis attended witness; Dr. Tyler attended witness for nine or ten months, during which time witness was unable to work,—could not do anything; witness did not go in the street until after June 24, when, with the use of a stick, he hobbled around the best he could; immediately after the accident, while witness was in the Chicago car, witness expectorated coal dust and blood; witness is still suffering from his injuries; there is a stitch—these muscles in witness' right leg, seem to be drawn a little and witness suffers pain almost all of the time; that witness still limps; that prior to the accident witness was in very good health and did not limp; that prior to the accident his weight was about 180, now it is about 165 or 170; that witness had personal property, consisting of wearing apparel etc., amounting to $102.48 in the car "Milton", at the time of the accident all of which was destroyed except the uniform which was torn; that the bill of Dr. Tyler, for medical attention and services to witness, by reason of the accident, is $250.

Witness further testified that his run between Washington and Wheeling, was from November, 1908, up until the time he was injured; that the ordinary salary of a Pullman porter is $25. a month and extras; that witness received $40 a month and extras the
58 reason witness got the additional $15. a month was because he was a porter in charge, collecting railroad transportation and Pullman transportation; that there was a railroad passenger

conductor on the train who collected transportation for the B. & O. Railroad Company until the train reached Fairmont; that after Fairmont, that is, after 3 a. m. the Pullman conductor went to bed and witness did not see him any more; after that hour, anybody that would get on witness collected; often if we were late going into Fairmont, witness received the passenger and took up the railroad transportation and turned it over to the train conductor; and witness also collected the Pullman transportation.

Q. For which you received how much a month? A. $40., $15. extra.

That there was a Pullman conductor and a railroad conductor witness' car after 3 a. m. the Pullman conductor would go to bed; that when the train left Washington, and until 3 a. m., the Pullman conductor collected the Pullman fares; the train conductor collected the train fares; when 3 a. m. arrived, the Pullman conductor went to bed; the railroad conductor was on the train. At that point, the railroad conductor has collected railroad fares from Pullman passengers, but not very often. A passenger getting on at that hour of the morning would want to retire and the porters in charge have to collect the Pullman and railroad transportation; this was a daily occurrence with witness; that witness received ticket and money from passengers.

Q. When did you make your accounting if you ever did, and to whom did you make your accounting for the moneys and
59 fares that you had collected after 3 a. m.? A. Whenever the train conductor would have a chance to come back and settle up.

Q. Usually when did he come back, about what hour A. If a passenger would get on—say for instance we are late going into Fairmont and there is where I would start to collect my fares. After leaving Fairmont I would collect transportation and after riding, well, say fifteen or twenty minutes, some passenger may have retired, and I would take the railroad transportation to give to the train conductor when he came back.

Q. Give it to the B. & O. conductor? A. Yes sir; the B. & O. train conductor.

Q. What became of the money if you had any? A. If I had any money I would pay him the money and he would give me a receipt to give the passenger the next morning.

Q. He would give you a receipt? A. Yes sir, a receipt.

Q. What connection, if any, did the Pullman conductor have to do with this accounting between you and the B. & O. conductor for fares that you had collected for the railroad? A. I did not see the Pullman conductor any more going. But coming back I had a hundred miles, and it was a little different.

Q. Did the Pullman conductor take any part in the accounting between you and the railroad conductor for moneys and fares
60 that you had received for the railroad company—going, I mean? A. No, sir; he would go to bed. I would not see him

any more. I would go to Wheeling, and get in there at 5:35, and he would go to bed at 3 o'clock.

Q. In respect to that custom, did it happen every time you made your trip, that same situation—did it happen every time? A. Every time; yes sir.

Q. Was it a part of your duty or not? A. It was part of my duties.

Witness further testified that his run to Wheeling from Washington commenced in 1908 and from that time until this accident, he received $40. a month; that prior to 1908, witness was a Pullman porter, being an extra man, and "ran" all over the country. His salary then was $25 a month and extras; that prior to 1908 he did not collect passenger fares for the railroad; that since the accident witness had not been in the Pullman service; is now employed at Ebbett House Buffét; that while in the Pullman service, and witness' income from salary and tips, averaged $100 per month. Witness further testified that he did not feel able to do any work until February, 1911, when he went to work for Mr. James F. Oyster, testing eggs with a candle, at a salary of $9 a week, but gave up his position, after about three weeks, because he found his sight had become impaired & his back became impaired from standing up candling eggs; he got employment next as a waiter at the Queen Cafe,
61 at $5. a week; he had to carry trays for 2 tables that were too heavy; the work was too heavy for witness, because it affected his back and he had to give it up; next attempted to work in the lunch counter, at the Union Station, for the Washington Terminal Company, where "short orders", that is, "orders that you carry in your hand without a tray"; worked there from April 24 until July 12; they have what is known as a relief department and the employes join an insurance company; after witness went to work there the physician of the company made a physical examination of witness, and witness continued to work there after that & until July 12th witness is now employed in the Ebbitt Buffét, receiving $18 a month and extras, which amounts to 75 cents to a dollar a day; witness is 29 years old; witness has a tried feeling in his back, a worn-out feeling; after putting in a day's work witness goes home and goes to bed; has pains all the time in his back and right limb, cannot walk today without limping.

On cross-examination witness testified that before he entered into the employment of The Pullman Company, he made a formal application for employment. Counsel for the defendant thereupon exhibited to the witness a printed copy of the formal application for employment by witness to the Pullman Company. (The stipulation between counsel for the plaintiff and defendant, which provides, that the original need not be produced, but that said copy, if competent, and admitted by the Court, might be used in lieu of the original, saving all proper exceptions to the plaintiff, was called to the attention of the Court.)

62 Thereupon, counsel for the defendant, on the cross-examination by him of the plaintiff, offered in evidence the said

copy of said application by plaintiff for employment to the Pullman Company, which is as follows:

Application for Employment as a Pullman Car Porter By G. R. Robinson.

To N. Main, Esq. 18st. Superintendent, The Pullman Company Washington Station, Southwestern Division 8/14 1895 Applicant's name Geo. Raleigh Robinson Address 1305 S St. N. W. Birthplace Louisa Co. Va. Age 22 Height 5 ft. 10 in. Weight 240.

Whether married, single or divorced. Single.

What family, or what person dependent on him for support? Mother.

How long at school, and what age he left it? 11 years, 20 years.

If subject to any sickness or infirmity which might prevent him from attending to the duties of the situation he seeks, what? None.

If crippled or deformed, in what manner? No.

If any defect in sight or hearing, to what extent? No.

If ever employed by The Pullman Company or other sleeping Car Company, when in what capacity, and in what capacity, and in what division? For what cause did he leave its service? Never.

The name, address and business of each of his employers within five years past, his position with each, and why and when he left the employ of each? I have been working for Mr. I. E. Black ever since I left Prof. Mason.

63 (For answer see outside fold of application.)

If ever suspended or discharged from a position, by whom and for what cause? Never.

If ever rejected by a guarantee or fidelity Company, for what reason? Never.

Is he temperate in his habits? Yes. Does he use intoxicating liquors? No.

Does he ever play games of chance, or gamble in any way whatsoever? No.

If in debt, is he seriously involved? No.

If engaged in any other business or speculation, what kind? No.

Any additional statements he may think best. I worked with Prof. Mason to get my education.

The names and addresses of two or three responsible persons, as references, not related to him. Prof. O. T. Mason, Mr. A. C. Wilson and Mr. I. E. Black.

I hereby declare that the foregoing answers made by me are true.

I hereby agree that in the event of my being employed in consequence of this application, I will only claim pay for my services when actually on duty, and will not claim pay when merely reporting for duty, or when waiting to be called for duty.

(Applicant's signature.)

GEORGE RALEIGH ROBINSON.

NOTE A.—The applicant will enter in the space above, in his own handwriting, in ink, answers to all questions and fill infor-

mation, as required by the blank; also file with this application letters of recommendation, including one from last employer.
64 NOTE.—Conductors are required to give a bond of indemnity from the American Surety Company in the sum of $500. This man has been vaccinated in 1904.
(Signed) N. MAIN, *D. S.*

Counsel for the defendant asked the witness if, after he made the formal application for employment, he signed a contract of employment with the Pullman Company. Witness replied Yes. Thereupon counsel for the defendant offered said contract of employment, at this time, in evidence. The same read as follows:

THE PULLMAN COMPANY,
WASHINGTON STATION,
DISTRICT OF COLUMBIA, *November* 17, 1905.

Contract of Employment.

Be is know-, That I, the undersigned, hereby accept employment by, and enter into, or continue from this date, in the service of, The Pullman Company upon the following express terms, conditions and agreements, which in consideration of such employment and the wages thereof I do hereby make with said The Pullman Company, to wit:

First. So long as I shall remain in said employment and service, I will fully comply with all regulations, rules and orders of said Company or its agents, issued for the government of its employees, go wherever I may be required in said service, and well, faith-
65 fully and honestly perform all duties assigned to me.

Second. My wages shall at all times be calculated and paid at the monthly rate per day for the number of days I shall have been actually employed, and I may quit or resign, or may be suspended or discharged from such employment and service, at any time, or at any place, without previous notice.

Third. If said Company shall suffer any loss or damage of any nature of character whatever resulting from the violation of any regulation, rule or order of said Company or its agents, or any fault, neglect, dishonesty or incompetency on my part, or in case any commissary supplies are placed in my custody and not returned or paid for by me in accordance with the rules of said Company, I will immediately upon notice thereof make with the proper officer of said Company a satisfactory settlement of such loss, damage, default or deficit, or failing so to do, the said Company is hereby expressly authorized, at any settlement made with me, to deduct from my wages the full amount of each and every such loss, damage, default or deficit, and to appropriate the same to its own use as liquidated damages. The value of commissary supplies shall be the prices shown on the Luncheon Check at the time; and it is hereby expressly agreed that each and every such loss, damage, default or deficit shall be finally determined by the proper officer of said Company and adjusted as hereinbefore provided.

Fourth. I assume all risks of accidents or casualties by railway travel or otherwise, incident to such employment and service, and hereby, for myself, my heirs, executors, administrators or
66 legal representatives, forever release, acquit and discharge The Pullman Company, and its officers and employees, from any and all claims for liability of any nature or character whatsoever, on account of any personal injury or death to me in such employment or service.

Fifth. I am aware that said The Pullman Company secures the operation of its cars upon lines of railroad, and hence my opportunity for employment, by means of contracts, wherein said The Pullman Company agrees to indemnify the corporations or persons owning or controlling such lines of railroad against liability on their part to the employees of said The Pullman Company in cases provided for in such contracts, and I do hereby ratify all such contracts made or to be made by said The Pullman Company and do agree to protect, indemnify and hold harmless said The Pullman Company with respect to any and all sums of money it may be compelled to pay, or liability it may be subject to, under any such contract, in consequence of any injury or death happening to me, and this agreement may be assigned to any such corporation or person and used in its defense.

Sixth. I will obey all rules and regulations made or to be made for the government of their own employees by the corporations or persons over whose lines of railroad the cars of said The Pullman Company may be operated while I am traveling over said lines in the employment or service of said The Pullman Company; and I expressly declare that while so traveling I shall not have the rights of a passenger with respect to such corporations or persons, which rights I do expressly renounce; and I hereby, for myself, my heirs, executors, administrators or legal representatives, forever re-
67 lease, acquit and discharge any and all such corporations and persons from all claims for liability of any nature or character whatsoever on account of any personal injury or death to me while in said employment or service.

I have read and understand every word of this paper.

GEORGE R. ROBINSON. [SEAL.]

Signed, sealed and delivered in presence of
C. L. MOFFETT,
Chief Clerk.

Insert date of signing; name of station; also state, territory or nation where signed. Then return to the Secretary of the Pullman Company, at Chicago, Illinois.

This man was vac-in*n*ated in 1904.

(Signed) N. MAIN, *D. S. W.*

68 Counsel for the plaintiff objected to said offer, first on the ground that evidence on the part of the defendant cannot be offered as a part of the plaintiff's case, even on cross-examination;

and secondly that the offer is further objected to on the ground that it is in the teeth of the Employers' Liability Act of 1908, under which it is claimed that this suit is brought, and particularly section 5 of the said Act of Congress, which provides that any contract, rule, or regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act shall to that extent be void. And further that there is no plea by the defendant in this case under which said alleged release could be offered, the Court having previously by order in the case sustained the demurrer of the plaintiff to the plea offered by the defendant. And further that the evidence is inadmissible, incompetent and irrelevant.

The COURT: That raises a new question as to there being no plea.

Mr. DAVID: They pleaded it before, your Honor. I assume they thought it necessary to plead it.

Mr. YERKES: Under that state of the case we will now offer our amended plea; although we think under the decision in the case of Brown against the Baltimore & Ohio Railroad Company, in the Sixth Appeals it is perfectly clear that this testimony is absolutely competent under the general issue.

The COURT: Why did you not go up on the demurrer to the plea?

Mr. DAVID: I wish he had.

The COURT: It would have saved a good deal of trouble.

Mr. DAVID: I thought he was going to do that.

69 The COURT: I do not know. I would not like to say off hand whether this release could be offered under the general issue. It has been the practice here, to my knowledge, to specially plead the release always. However, if you want to stand on the general plea——

Mr. YERKES: We tender our amended plea and ask the court now for the privilege of having it filed.

Mr. DAVID: We object to that.

The COURT: What is your objection?

Mr. DAVID: That the issues were framed before this jury was sworn and carefully fought out on the law some months ago, and we came to the trial of this case with the idea that the law of the case had been determined; and we are now taken by surprise.

The COURT: If he should be given leave to file an additional plea now you would be entitled to a continuance.

Mr. DAVID: I am not after any delay. I am simply after preserving whatever legal rights I have.

The COURT: I am doubtful if it is proper to allow that plea to be re-filed now.

Mr. YERKES: I would like to read that case of Brown versus B. & O. to your Honor.

The COURT: If you want to take the chance of pleading under the general issue——

Mr. YERKES: I will take the chance.

The COURT: I do not think it would be fair to have that special

plea refiled at this time, after the demurrer has been sustained. But I will let you plead under the general issue and you can save that point.

70 Mr. DAVID: Your Honor makes a ruling then?

The COURT: Yes; I overrule your objection and admit the contract.

Whereupon counsel for the plaintiff noted an exception to the ruling of the court, upon the grounds stated hereinabove, which exception was allowed and noted on the minutes of the presiding Justice.

"Thereupon, by permission of the court, the witness, GEORGE R. ROBINSON, who was still upon the witness-stand, not having left said stand, was further interrogated by plaintiff's counsel and he testified as follows:

That, when he referred in his testimony already given, to "Wheeling", he meant, Wheeling, West Virginia; that Cumberland is in Maryland; that some of the principal stations between Washington and Wheeling, W. Va., where his train ran, were Washington Junction, Harper's Ferry, West Virginia. Said train ran through parts of Maryland and West Virginia. The court inquired the object of his testimony and counsel for plaintiff stated it was to show that said train was an inter-state train. The court stated that judicial notice would be taken of that fact.

Witness was asked how, if at all, he was equipped for the collection of fares and tickets of the B. & O. passengers, so far as the B. & O. Railroad Company was concerned, and he answered: I had punches and checks for the Pullman, and an envelope with a duplicate number which I tore off when I took the passengers' railroad transportation, and gave the passengers the duplicate number, which would show the number of their berth. At the times that

71 they would get off or before they would get off I would collect this slip, this receipt that I would give them for their transportation, and return their mileage or the portion of their ticket, or anything that was due them, to complete their trip—that the foregoing refers to part B. & O. and part was the Pullman; that witness started to collect the fares from passengers on behalf of the B. & O. Railroad at 3 o'clock a. m.; that witness received money from passengers for their transportation as B. & O. Passengers; he also received from passengers B. & O. mileage, apart from Pullman transportation; that witness made accounting to the train conductor of B. & O. transportation he received from passengers; that he performed that service from November, 1908, until April 9, 1910; that no passenger could ride in the Pullman coach without railroad transportation, such B. & O. transportation being the first thing we would ask for; witness used the punch for the Pullman checks, for accommodation of berths and seats;

Q. Explain what paraphernalia you had in order to perform your duty in the collection of transportation on behalf of the B. & O. Railroad Company, apart from Pullman transportation?

Counsel for defendant objected, same was overruled, exception reserved by defendant, and witness answered:

A. They furnished me an envelope with a duplicate number. That was receipt for the mileage or any transportation.

Q. Who furnished you with that? A. It was furnished by the Pullman Company from the office of the Pullman Company.

Q. Where; at what point A. No; that is wrong. It was
72 furnished by the railroad company.

Q. To you? A. Yes sir. Very often we could not get them in the Pullman office and we would have to go to the railroad office and get them.

Witness got them sometimes from the passenger agent's office of the B. & O.; would get them there whenever they would give out—cannot say how many times he got them there; he remembers that one day the chief clerk sent witness there after them; the envelope was about four or five inches long and about two inches wide; it was a B. & O. envelope; had nothing inside but on the outside was marked "Baltimore & Ohio Railroad";

Q. How was that used by you? A. When I would receive the transportation from a passenger, the railroad transportation, I would put the transportation in the envelope and give the passenger a receipt.

Q. That was B. & O. transportation? A. Yes, sir.

Q. Not Pullman? A. No sir. I would give the Pullman a different check.

The Pullman transportation is a check, like a car-fare; witness received money from passengers for B. & O. transportation; he turned it over to the B. & O. train conductor.

Thereupon, counsel for the defendant cross-examined witness, who testified as follows:

Q. You spoke of the difference between a Pullman porter and a Pullman porter in charge, one getting $25 a month and
73 the other $40 a month. The Pullman porter in charge only takes charge of the car after the Pullman conductor has gone to bed; is not that true? A. Coming back it was different.

Q. Answer my question. Is not that the fact? A. It is not always true.

Q. After the Pullman conductor goes to bed then the porter in charge of the car takes control of it? A. No, sir.

Witness testified "I leave Wheeling without a conductor at 5 o'clock in the evening, and I would not see a conductor until 10:25 at night"; the porter in charge is the porter that has charge of the car in the absence of the conductor, whether it is after he has gone to bed or before he goes upon the train; that makes the difference in the porter's wages; whenever a porter who has been acting as an ordinary porter, at $25 a month, is assigned to a run where he has charge of the car in the absence of a conductor, then his salary is $40; on train witness worked, at time of accident Capt. Barber was witness' conductor; the Pullman conductor took up from passengers in Pullman car the Pullman tickets and issued to them a Pullman

check—this was done until the Pullman conductor retired for the night;

Q. And the train conductor, when he came into the car after a passenger entered it, the Pullman car, he took his ticket, did he not? A. No.

Q. Do you mean to tell me the Pullman conductor always took up the ticket of the passenger that was due the railroad company? A. Not always.

Q. And the train conductor never goes into the Pullman
74 car to get those tickets? A. He will come in. If the passenger wants to retire we will take the ticket.

Q. Does not he always come in in the day time and get it, and does not he come in at night unless it is very late? A. Not always.

Q. Is not that the rule? A. Well, he does not always come in.

Q. Is not that the general rule? A. I don't know whether it is the rule or not.

Witness testified that when witness was in charge the first thing he did was to find out if passenger in Pullman coach had railroad transportation, then witness would collect the Pullman transportation. If he had a railroad ticket, witness received it and put it in an envelope; did not punch it if it was a ticket beyond the destination or if it was mileage I would have to give to passenger a receipt; if ticket was not beyond destination, I took it, but did not punch it, but simply put it in the envelope; when I handed that ticket to the train conductor, if he accepted it, he punched ticket; in the morning the train conductor, who came as far as Washington with me (his destination being Jersey City my car would be cut off) turned over to me all the transportation to give to the passengers in my car when they got up; I gave same to passengers and got the receipts back; if ticket had expired at Washington, I did not have anything to give to passengers; if passenger was going to Baltimore or New York I would give him back his ticket that carried him on to either of those points; if he had mileage I would give
75 it to him at Washington; I would give passengers back whatever the conductor handed to me and get receipts from passenger; the Pullman conductor would be in bed, train arrived here at 6:30 a. m. and Pullman conductor would never be up in time to get transportation; the last train conductor, who got on at Cumberland, Md. after checking up the railroad transportation, would give me the transportation to return to my passengers the next morning; the envelopes referred to, witness sometimes got from the Pullman office; I have borrowed them from the Pullman conductor; got them also from chief clerk of Pullman office in Washington or sometimes he would instruct the messenger to hand them to me; I was not getting them for my conductor; they were for my use; never handed them to my conductor; I remember that one day they sent me to the B. & O. office to get envelopes; chief clerk of Pullman Co. sent me there; I got envelopes from B. & O. office in Union Station, Washington, D. C. one time, for use in putting those tickets in which I received on train from passengers;

Q. And you were sent down from the chief clerk's office of the Pullman Company to the B. & O. Railroad office to get those envelopes, and you get them? A. I am quite sure I got them.

Q. You got them from the B. & O. Office in the Union Station? A. Yes, sir.

Q. Don't you know as a matter of fact there is no Baltimore & Ohio office in the Union Station? A. There must have been. At the ticket office, then—because I am quite sure I got some.

76 Q. Did you not say you got them from the B. & O. Railroad office; and don't you know as an absolute fact there is no B. & O. Railroad office in the Union Station? A. The head office is in Baltimore.

Q. Answer my question. Don't you know as an absolute fact there is not and never has been a Baltimore & Ohio Railroad Office in the Union Station? A. I must have got them from the ticket office then. In speaking of the B. & O. office witness meant the ticket office; doesn't know the name of the man he got envelopes from; when witness arrived at Grafton, night of accident, he saw conductor, train conductor, leave the train, saw engineer leave the train, and saw both of them go into the operator's office, and saw flagman go there to get their orders; asked as to how many cars were in the train on that occasion, witness said three Pullman cars, one first class coach, one car, half baggage and half smoker; and there were two other cars; then the tender and engine; my car was last one; when we got to Grafton my duty was to open up my car, take my stool, get off the platform and stand there at the entrance of last car, with a lantern; electric lights were there; I always in receiving passengers kept my eyes on the crew because the train conductor always gives the signal to move out. Witness further testified that train was slowing down when accident occurred; when collision occurred floor of sleeper was knocked out and I dropped through; my feet were wedged in.

On re-direct witness testified that while he worked as a porter, the B. & O. had a ticket office at the Union Station in Washington and one could buy a B. & O. ticket at the station from the

77 B. & O. agents there; the way I looked at it, it was a joint ticket office selling tickets on any train and the men who sold B. & O. tickets I would presume were ticket agents; witness got the envelopes, on the occasion heretofore referred to, from the ticket office window at the joint offices of all the railroads, including the B. & O.

Thereupon counsel for the plaintiff introduced in evidence the train sheet, entitled "Baltimore & Ohio Railroad Company, Wheeling Division, East End," produced in open court by the defendant, in compliance of the order to produce made by the court upon the motion of the plaintiff.

That the said train sheet, made by Despatcher Rushford, defendant's agent in charge of the running of defendant's trains on the Wheeling Division, between 12:01 a. m., and 8 a. m., April 10, 1910, showed that defendant's extra train, No. 2610 running light, left Grafton, W. Va., west-bound, at 1:40 a. m. April 10, 1910, and

arrived at Fetterman, W. Va., at 1:47 a. m., April 10, 1910, and remained at said Fetterman until 2:17 a. m., April 10, 1910, when it proceeded westwardly; that said extra train was in charge of Conductor D. L. Wilson and Engineer George H. Hardman; and further, that train sheet failed to show that said extra train 2610 reached the next station, Valley Falls, but shows that said extra train returned to Grafton, W. Va.; said train sheet also showed that passenger train No. 7, after leaving Grafton, W. Va. at 2:07 a. m. April 10, 1910 and proceeded westwardly; under heading of "Delays Westward" at the bottom of said train sheet is this notation: "7 Rn to V. F. looking out for cow hit by 330 Ex. 2610 ran into No. seven
78 setting fire to rear sleeper; "that Rn had reference to Fetterman & V. F. to Valley Falls; said train sheet also showed that train No. 7, engine No. 2007, was in charge of Conductor Shahan and Engineer Johnson, and that it departed from Grafton, W. Va., at 2:07 a. m. April 10, 1910, and passed Fetterman, W. Va., at 2:12 a. m., April 10, 1910, and arrived at Valley Falls, W. Va. at 2:50 a. m., April 10, 1910, and departed from Valley Falls, W. Va., at 3 a. m. on said date reaching Fairmont, W. Va., at 3:25 a. m., on said date.

Said train sheet also showed that defendant's extra train No. 330, engine No. 1016, running light, departed from Grafton, W. Va., at 12:25 a. m., April 10, 1910, west-bound, and passed Fetterman, W. Va., at 12:30 a. m., on said date, and arrived at Valley Falls, W. Va., at 12:55 a. m., on said date, and remained at said Valley Falls until 1:10 a. m. on said date.

The plaintiff also offered in evidence "the train order book" of the defendant's Wheeling Division, east-end branch, produced by defendant in compliance of the order of court on the motion of the plaintiff; that said book commenced with train order No. 35, on April 8, 1910, and closed with train order No. 6, of April 10, 1910, sent at 12:58 a. m., from Wheeling, W. Va., and received by Conductor Stuck and Engineer Baugh, running train No. 330, westwardly, from Grafton, W. Va., at 1:07 a. m., April 10, 1910, at Valley Falls, W. Va., which said train order No. 6 directed said Conductor and Engineer to run the said extra train No. 330 from said Valley Falls, W. Va., to Fairmont, W. Va. That in addition to said last mentioned train order book of the defendant, the plain-
79 tiff introduced another train order book of defendant, same division, which was produced by the defendant in compliance with the order of the court, on motion of the plaintiff, which said last mentioned train order book commenced with train order No. 7, sent at 1:04 a. m., April 10, 1910, and concluded with train order No. 21, sent at 5:14 a. m., April 12, 1910. Plaintiff offered both of the said train order books in evidence, and they were received without objection. And neither of the said train order books of the defendant contained any train order whatever to extra train No. 2610 or to train No. 7, or to the conductors or engineers of either.

The aforesaid train order sheet, covering Sunday, April 10, 1910, from 12:01 a. m., to 12 o'clock, midnight, shows the movements of train No. 7 on said Wheeling Division, as follows: left Grafton, W. Va., 2:07 a. m.; passed Fetterman W. Va. 2:12 a. m.; arrived at

Valley Falls, W. Va. 2:50 a. m. and departed said Valley Falls 3 a. m., passed Colfax Tower, 3:11 a. m.; passed Benton Ferry, W. Va. 3:16 a. m.; passed Gaston Junction, W. Va. 3:21 a. m. and arrived at Fairmont W. Va. at 3:25 a. m., and left Fairmont at 3:45 a. m.

Thereupon, the counsel for the plaintiff introduced in evidence, and read to the court and jury the deposition of GEORGE H. HARDMAN, which was duly taken before trial before L. G. Holbert, a Notary Public, Marion Co. W. Va. and duly appointed Commissioner to take said deposition by order passed in this cause by this court counsel for plaintiff and defendant being present:

Said witness testified as follows:

80 That he is an engineer and resides in Grafton, W. Va.: that he is now, and was on April 10, 1910, and before said date, employed by the B. & O. R. R. Co., defendant herein, as such engineer on the Wheeling Division, running between Grafton, W. Va. and Wheeling, W. Va.; that he has been employed on that Division for about 12 years; that on April 9, 1910, witness was running engine 2610 of the Baltimore & Ohio Railroad Co. between Grafton, W. Va. and Fairmont, W. Va.; that his train was an "Extra" of the fourth class; that he ran said engine on the morning of April 10, 1910; that he received the order to run said engine from the Chief Caller of the B. & O. Co. at Fairmont, W. Va.; started engine from Fairmont, W. Va. and went to Grafton, and turned around at the Y, which is three legged track around a triangle used to turn engines around, located near the "Grafton House"; that before leaving Grafton, witness reported to the Despatcher of the B. & O. R. Co. for orders, and received from him a "clearance" which is a card that shows there are no orders, but means "to proceed" with your train; after receiving said "clearance" at Grafton, witness proceeded with his engine to Fetterman, W. Va., the next telegraph station; witness had no further orders at the time he received the "clearance" at Grafton; the name of "witness' fireman was Bogess, don't know his initials; his conductor was a man named Wilson; witness thinks his first name is Dan; witness was asked what time his engine started, on his return trip, from Grafton, to Fairmont, and he testified: well, we were laying at Fetterman and what time we turned round at Grafton, I could not tell you; we laid at Fetterman for No. 7 and witness left

Fetterman, with his engine, at 2:17 a. m. April 10, 1910;

81 that witness remained, with his engine, at Fetterman, something like 30 or 40 minutes; that at the time the weather was kind of cloudy; it was not raining, but quite chilly; witness' engine was destined for Fairmont; his engine was what is known as "a light engine"—that is, a locomotive running light, without any cars, excepting the caboose; that witness reported the arrival of his engine at Fetterman, W. Va., to the telegraph office; witness was asked at what time he made said report, and he answered; I could not tell you. I don't remember just what time we put back in for No. 7; that witness ran his engine to Fetterman, from Grafton, on the main line of the B. & O. railroad, and "backed in out of the way of No. 7 into the siding to wait for No. 7" and he waited with his

engine, on said siding for No. 7 to pass his engine; that Fetterman, is about 1½ miles from Grafton, that witness knew the regular schedule time of passenger train No. 7 of the B. & O. Railroad running from Washington D. C. to Wheeling, W. Va. in April, 1910; that the schedule time of said No. 7 between Fetterman and Valley Falls, in April, 1910, and still is, is nine minutes; that No. 7 was due at Fetterman at about 2 A. M.; that on April 10, 1910, No. 7 was late; I remember that No. 7 passed through Fetterman at 2:12 a. m.; that the rate of speed of No. 7 between Grafton and Fairmont, varies—runs from 35 to 55 miles an hour; witness was asked whether train No. 7 usually stopped between Grafton and Fairmont, and witness answered no; that the light engine which witness was running on that night followed behind passenger train No. 7 of the B. & O.; witness was asked the following questions and he gave the answers hereinbelow set forth: Q. Now, Mr. Hardman, when
82 your light engine moved from the siding onto the main line, did you or not receive permission to go on the main line, from the operator? A. Yes, sir, I got a clearance from the operator. Q. Was this a clearance card or signal? A. Form A and also a signal. Q. Describe the signal? A. An arm upon a pole; when it is up it is red and when it is down it is white. Q. This white light showed you when No. 7 passed? A. Showed me that I had a clear track; to go on; had permission to go. Q. About how many minutes after No. 7 had passed Fetterman did your engine follow it? A. It started out of there in about 5 minutes; between 5 and 6 minutes.

Witness further testified that at that time there was a rule of the B. & O. R. Co. providing that an inferior train should keep at least 5 minutes off the time of a superior train going in the same direction; that at that time the rule of the company allowed me to proceed with my engine behind the passenger train No. 7, after 5 minutes had elapsed, after said No. 7 passed my engine; that No. 7, at that time, was travelling west; after No. 7 passed, going west, through Fetterman, on said morning of April 10, 1910, witness waited in the telegraph office at Fetterman until the time witness left during the time he waited he talked with the operator; witness was asked if the telegraph operator at Fetterman gave witness any train orders, telegraph message or any message concerning the running of witness' engine between Fetterman, W. Va. and Fairmont, W. Va. and witness answered: Nothing only the form A and clearance; witness was asked to explain again what a form A clearance is and he replied: A clearance giving you the right to proceed with-
83 out any further orders; that witness did not receive any orders from the train despatcher, or from any official of the B. & O. Railroad Co. on the occasion in question concerning the condition of the track between Fetterman and Fairmont; witness further testified that engineers on through trains, both passenger and freight, run their trains under the direction of the Train Despatcher, through the telegraph operators, and that all train orders are issued to trainmen under the initials of the Superintendent; that the speed of No. 7, as it passed Fetterman, on the occasion in question was its usual speed through the yard limits, and that it ran just about 15

miles an hour, after No. 7 had passed Fetterman, witness stayed there until witness received this clear signal; that said clear signal informed witness that his time had expired and that witness was at liberty to proceed with his engine; said signal did not mean that the track was clear as we did not have the block signal at that time between Fairmont and Grafton; said signal merely meant that No. 7 had been gone 5 minutes; witness does not know the name of the telegraph operator, who was on duty at Fetterman, at that time; that said telegraph operator, at Fetterman, on the night of April 9-10, 1910, gave witness no information to the effect that passenger train No. 7 of the B. & O. was going to run slowly or stop near the "Wickwire" bridge on that night; that the "Wickwire" bridge is about 3 miles west of Fetterman, as near as witness remembers; that it would not take quite 5 minutes for No. 7 to run from Fetterman to the "Wickwire bridge" —they have a seven mile run there in nine minutes; that witness drove his engine around the big curve at "Wickwire bridge" on the occasion in question, and the first thing witness saw was No.
84 7's deck lights, and witness's engine was then within about 30 or 40 feet of No. 7; the curve varied to the left and witness had no view of No. 7 around that curve and before the collision of witness' engine with No. 7, witness heard no torpedoes go off;

Q. Mr. Hardman, at the time your engine collided with the rear end of No. 7, at about what rate of speed was No. 7 moving? A. That would be impossible for me to tell; but it was moving very slowly. I thought she was standing still when I seen her; I would judge about 4 or 5 miles an hour. That was not the usual speed of No. 7; at that time my engine was running as near 25 miles an hour as I could figure it out; that before the collision, witness was looking out of the window of his engine all the way round; witness was asked why he didn't stop when he saw the red lights on the rear end of No. 7 and witness replied; I stopped as quick as I could; that the track at the point of the collision was curved to the left, witness doesn't know just what degree, but it is a heavy curve there; witness testified that he did not hear the engineer of No. 7 sound a whistle signal for the flagman on No. 7 to go back and place torpedoes on the track; the last car of No. 7 was a Pullman; that neither witness nor his fireman jumped from their engine before witness's engine struck the rear end of No. 7; witness remained right on the seat of his cab, and tried to get the reverse bar back, but didn't have time to get it back; asked as to whether No. 7 was standing still when witness' engine struck her, witness said "No, sir; I could not;
85 all I have is their word for it. When I first saw her I thought she was standing still"; that the distance from the scene of the wreck to the nearest railway station, Fetterman, W. Va., is three miles; witness was asked if he knew whether the engineer of No. 7 received an order from the Despatcher to stop near the "Wickwire Bridge" and he replied No, sir. I don't think he received any order to stop; witness was asked what is necessary to notify crews of extra trains of unexpected changes in the schedule running time of passenger trains, and he answered: They are supposed to give you an order the same as they give the leading trains, and that despatchers

are supposed to give following trains a copy of the order changing the schedule time of trains ahead; such train orders are given in different forms. Most of the orders, at that time, were given on "19 order" which specifies the number of the train and the running,—so much late or such a point, destination, and are delivered to the crews of the different trains through the telegraph operators. That witness did not receive any train order, telegraphic message, or any other instructions concerning the proposed change in the running time and the reduced speed of No. 7, and the probability of said passenger train stopping near the Wickwire Bridge in the early morning of April, 10, 1910; that witness could have avoided a collision with No. 7 on the occasion in question if witness had received the train order or telegraphic message from the telegraph operator or train despatcher of the B. & O. Railroad stating that No. 7 was to slow down or stop near the Wickwire Bridge; the said flagman was not on the rear end of the platform when witness first saw the train; that it was the custom, at that time, for engineers and
86 conductors to go to the telegraph office and receive their orders, and they signed up for them;

Counsel for the defendant company waived cross-examination.

The foregoing deposition was properly signed by witness, made out and returned in due form by the Notary and Commissioner, and said deposition was duly published by the Supreme Court of the District of Columbia, in open court. And to further maintain the issues joined, the plaintiff produced two physicians and surgeons who testified that they attended the plaintiff, professionally, since the happening of the accident to the plaintiff; that the said physicians testified as to the plaintiff's injuries, sustained by him in the said accident, and by the testimony of said physicians, the plaintiff sustained the allegations set forth in the declaration in this case in regard to the plaintiff's said injuries.

And to further maintain the issue joined, plaintiff produced SAMUEL E. CORBIN, as a witness, who, after being duly sworn testified as follows: That he is employed by the defendant in the passenger department, this city; that said company has a passenger office in this city and carries on business here; the defendant company sells railroad tickets at 15th Street and N. Y. Ave., 619 Penn. Ave., and the B. & O. is represented by the Washington Terminal Company at the Union Station, which sells tickets at the Union Station for all of the railroads including the B. & O. that witness was a passenger on the B. & O. train No. 7, in the car "Milton" when the collision occurred—April 10, 1910, while the train was on its way to
87 Wheeling, W. Va. from Washington D. C.; asked as to the cause of the wreck, witness said: a rear end collision, hit by a light engine and caboose of the Baltimore & Ohio Company; wreck occurred about 2 o'clock in the morning, near Fetterman, a few miles from Grafton, W. Va.—that is, three or five or two miles; witness was asleep at the time of the wreck, but was awakened by it.

The foregoing constitutes all of the evidence and testimony offered in the case and the plaintiff announced his case closed in chief.

And thereupon, counsel for the defendant moved the court to instruct the jury to render a verdict in favor of the defendant on two grounds, first that the Employers' Liability Act does not apply in this case—because the plaintiff is not an employé of the defendant company; and secondly, the failure of the plaintiff to prove negligence on the part of the railroad company, and it cannot be assumed that there was negligence.

After the court announced what his ruling was, and before the jury were actually instructed by the court to render their verdict in favor of the defendant, the plaintiff, by his counsel, requested the court to submit the case to the jury, subject to the opinion of the court on the law of the case, counsel for plaintiff calling the attention of the court to the decision in case of McNamara v. Washington Terminal Company, in the Court of Appeals, but the court declined so to do, stating:

The COURT: They made a motion in that case at the conclusion of the testimony by the defendant, after the whole record was in, and if that were the case now I think I would then have discretion to let the jury take the case, subject to the opinion of the court as to the law. But as the case is at present, I will have to pass upon it at this time." To which ruling of the court, counsel for the plaintiff then and there noted an exception, which was entered upon the minutes of the presiding justice.

And accordingly the court instructed the jury to find its verdict in favor of the defendant, previous to which verdict by the jury, counsel for the plaintiff then and there noted his exception to said ruling, and instruction, upon the grounds, first, that under the undisputed evidence and testimony in the case, the plaintiff was an employé of the defendant railroad company within the meaning and interpretation of said Employers' Liability Act of 1908, and in view of the decision of Justice Anderson made in this case; and that, therefore, plaintiff was entitled to go to the jury the evidence showing that defendant company, by its agents, was negligent, and that said negligence caused the injuries complained of; and upon second ground, namely, that even if the plaintiff should be held not to be an employé within the meaning of the Employers' Liability Act, and that his status on that train was that of a licensee, he would be entitled to recover under the first and second counts of the declaration, the alleged release cannot be considered for any purpose in this cause because (*a*) there is no plea of release in this case, at this time, on behalf of the defendant, said plea setting forth said release having been stricken from the record by Justice Anderson, in his decision on the demurrer of plaintiff to defendant's said plea, and that
89 this trial court, during this trial, had refused to allow the defendant to re-file said plea of release, or any plea of release, and (*b*) because the testimony in this case shows that said alleged release was signed November 17, 1905, and between that date and the year 1908, plaintiff was on "extra" porter, receiving $25 per month, and in 1908, plaintiff was promoted and advanced in position to porter in charge, with a regular run from Washington, D. C., to Wheeling, W. Va. with compensation, increased to $40 per month,

plaintiff being required from [illegible] to and including the date of the accident, to perform additional and different duties, to wit: the collection of transportation for the D. & G. R. Co., and said alleged claims for the reasons last aforesaid, became, was and is unreflective and unenforcible in this case, and the foregoing, and every of plaintiff's said exceptions were duly noted by the judge presiding at the trial, in the presence of the jury, at the time they were severally taken, prior to the rendition by the jury of the verdict for the defendant, upon the instruction and direction of the court.

And inasmuch as the plaintiff desires to present his exceptions to the Court of Appeals of said District, he moves the court to sign and seal this his bill of exceptions, to have the same force and effect as if each and every of them had been separately signed and sealed, which motion is by the court granted, and the said exceptions are hereby made part of the record in this case, according to the statute in such case made and provided, and it is accordingly done, now for then, this 26th day of August 1912.

LOUIS W. GOULD, *Justice.* [SEAL.]
Justice.

(9) *Assignment of Errors.*

Filed August 31, 1912.

* * * * * * *

Now comes the plaintiff, by his counsel, and assigns the following errors, and says that the trial Court erred as follows:

1. In permitting the defendant to introduce in evidence as to behalf, upon the cross-examination of the plaintiff as a witness, the written contract of employment between the plaintiff and The Pullman Company, over the objection and exception of the plaintiff.

2. In permitting said contract between the plaintiff and the Pullman Company to be received in evidence, on behalf of the defendant, to operate as a release of the defendant company of plaintiff's cause of action.

3. In holding that the plaintiff was not an employee of the defendant company within the meaning of the Employers' Liability Act, approved April 22, 1908.

4. In holding that, even though the plaintiff was not an employee within the meaning of said Employers' Act, he was not entitled to have his case submitted to the jury on the theory that said contract of employment between the plaintiff and the Pullman Company was unenforcible and unreflective for the reasons hereinbefore stated under 6 (a).

5. In instructing the jury at the conclusion of plaintiff's testimony, over the objection and exception of the plaintiff, to render a verdict in favor of the defendant, because the testimony of

91 the plaintiff showed that, at the time the plaintiff sustained the injuries complained of in the declaration, he the employees of the defendant, its agents and servants, the defendant was a common carrier by railroad, engaged in interstate commerce, and said injuries occurred to plaintiff, while he was employed by the defendant in such commerce, and that said testimony showed the

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plaintiff to be an employé of the defendant at said time within the meaning of the Employers' Liability Act, approved April 22, 1908, and under said Act the plaintiff was entitled to recover in this cause.

6. In admitting in evidence, over the objection and exception of the plaintiff, the written contract of employment between the Pullman Company and George R. Robinson, dated November 17, 1905, containing an alleged release to and discharge of any and all corporations from all claims for liability on account of any personal injury said George R. Robinson might sustain while he traveled in a Pullman car annexed to a railroad car, for the reasons that—

(*a*) As shown by the record in this cause, the defendant Company pleaded the said alleged release, and the plaintiff demurred thereto, and after consideration thereof by the Court, the said demurrer was sustained as to said plea, as appears by the order of this Court;

(*b*) Because the undisputed testimony of the plaintiff showed that at the date of said alleged release, to wit: November 17, 1905, up to 1908, the plaintiff was an "extra" porter of the Pullman Company, and between November 17, 1905, and 1908, the plaintiff received a salary of Twenty-five ($25) dollars per month; and in 1908, plaintiff was promoted to the position of porter in
92 charge with a regular run between Washington, D. C., and Wheeling, W. Va., at an increased compensation, to wit: Forty ($40.) dollars per month, and from said 1908, up to and including date of the happening of the injuries to plaintiff, to wit: April 10, 1910, plaintiff was such porter in charge, and as such, one of the duties performed by plaintiff, and accepted by the defendant, was the collection by plaintiff of railroad transportation for and on behalf of the defendant company; the court erred in not holding that, by reason of the advanced position and promotion of plaintiff, carrying increased compensation to plaintiff, the said alleged release dated November 19, 1905, was non-effective and unenforcible in this case.

(*c*) Because said alleged release was improperly admitted in evidence under the general issue plea of defendant.

(*d*) Because the court allowed the defendant to offer said alleged release as a part of the plaintiff's case in chief.

7. In refusing to rule that the decision of Justice Anderson, and the order entered by him sustaining the plaintiff's demurrer to the defendant's amended plea, constituted the law of the case so far as the trial court was concerned.

8. In over-ruling the motion of the plaintiff, after the court announced that the plaintiff was not entitled to recover, and before the jury were actually instructed by the court to render a verdict in favor of the defendant, to submit the case to the jury, subject to the opinion of the court on the law.

9. In directing the jury to return a verdict in favor of the defendant, over the objection and exception of the plaintiff, and in rendering a judgment on said verdict.

ALEXANDER WOLF,
LEVI H. DAVID,
Attorneys for Plaintiff.

93 Service of the foregoing assignment of errors by delivery to us of a carbon copy of the same, this 31st day of August 1912.

HAMILTON, YERKES & HAMILTON,
Attorneys for Defendant.

Directions to Clerk for Preparation of Transcript of Record.

Filed August 31, 1912.

* * * * * * *

Mr. John R. Young, Clerk:

Please prepare and include the following in the transcript of record in the above case, on appeal to the Court of Appeals;

1. Declaration.
2. Plea, not guilty.
3. Memo.: Filing of joinder of issue, notice of trial and note of issue.
4. Memo.: Order dated October 21, 1910, granting leave to defendant to file an additional plea.
5. Additional plea.
6. Plaintiff's demurrer to said additional plea.
7. Order sustaining demurrer to defendant's said additional plea.
8. Order extending time to file amended plea.
9. Opinion of court sustaining plaintiff's demurrer to defendant's additional plea.

94 10. Plaintiff's motion for order on defendant to produce certain records.

11. Order directing defendant to produce said documents.
12. Memo.: Jury sworn; verdict for defendant.
13. Plaintiff's motion for a new trial.
14. Order over-ruling same.
15. Judgment for defendant.
16. Appeal noted in open court; cost bond fixed at $100.
16. Memo.: Appeal to Court of Appeals; citation issued and service accepted by defendant.
17. Memo.: Appeal bond, with surety, approved by the court and filed.
18. Memo.: Submission on July 11, 1912 of bill of exceptions by plaintiff's counsel.
19. Memo.: The three orders extending time for settling bill of exceptions and filing transcript of record, with dates.
20. The bill of exceptions.
21. Assignment of errors.
22. This precipe.

ALEXANDER WOLF,
LEVI H. DAVID,
Attorneys for Plaintiff.

Service of the foregoing, a carbon copy of the same being received by us, on the 31st day of August 1912.

HAMILTON, YERKES & HAMILTON,
Attorneys for Defendant.

95 *Further Designation of Record.*

Filed September 5, 1912.

* * * * * * *

To the Clerk of the Court:

The Clerk will please include in the transcript of record to be prepared in the above-entitled cause the written agreement of counsel for plaintiff and defendant, filed in said cause on June 11, 1912.

HAMILTON, YERKES & HAMILTON,
Attorneys for Defendant.

96 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 95, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copies of which are made part of this transcript, in cause No. 52878 at Law, wherein George R. Robinson is Plaintiff and The Baltimore and Ohio Railroad Company is Defendant, as the same remains upon the files and of record in said court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 16th day of October, 1912.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG, *Clerk,*
By ALF. G. BUHRMAN,
Ass't Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 2474. George R. Robinson, appellant, vs. The Baltimore and Ohio Railroad Company, a corporation. Court of Appeals, District of Columbia. Filed Oct. 17, 1912. Henry W. Hodges, clerk.

TUESDAY, *February 4th, A. D.* 1913.

No. 2474.

GEORGE R. ROBINSON, Appellant,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation.

The argument in the above entitled cause was commenced by Mr. L. H. David, attorney for the appellant and was concluded by Mr. J. W. Yerkes, attorney for the appellee.

In the Court of Appeals of the District of Columbia.

No. 2474.

GEORGE R. ROBINSON, Appellant,
v.
THE BALTIMORE & OHIO RAILROAD COMPANY, a Corporation, Appellee.

Opinion.

Mr. Justice VAN ORSDEL delivered the opinion of the Court:

This suit was brought by appellant in the Supreme Court of the District of Columbia against defendant, the Baltimore & Ohio Railroad Company, to recover damages for injuries sustained by plaintiff on April 10, 1910, while engaged in the performance of his duties as a Pullman porter. At the time of the accident he was the porter in charge of a car belonging to The Pullman Company which formed part of a train of defendant company operating in interstate commerce between Washington, D. C., and Wheeling, W. Va. On the trial below, when the testimony on behalf of plaintiff had been given, the court, on motion of counsel for defendant, instructed the jury to return a verdict for defendant. From the judgment thereon, the case comes here on appeal.

It appears that on August 21, 1905, plaintiff made written application to The Pullman Company for employment as a Pullman-car porter. In the following November, he was taken into the service of The Pullman Company, signing a written contract as a condition of his employment, the material provisions of which are as follows:

"Fourth. I assume all risks of accidents or casualties by railway travel or otherwise, incident to such employment and service, and hereby, for myself, my heirs, executors, administrators or legal representatives, forever release, acquit and discharge The Pullman Company, and its officers and employees, from any and all claims for liability of any nature or character whatsoever on account of any personal injury or death to me in such employment or service.

"Fifth. I am aware that said The Pullman Company secures the operation of its cars upon lines of railroad, and hence my oppor-

tunity for employment, by means of contracts, wherein said The Pullman Company agrees to indemnify the corporations or persons owning or controlling such lines of railroad against liability on their part to the employees of said The Pullman Company in cases provided for in such contracts, and I do hereby ratify all such contracts made or to be made by said The Pullman Company and do agree to protect, indemnify and hold harmless said The Pullman Company with respect to any and all sums of money it may be compelled to pay or liability it may be subject to, under any such contract, in consequence of any injury or death happening to me, and this agreement may be assigned to any such corporation or person and used in its defense.

"Sixth. I will obey all rules and regulations made or to be made for the government of their own employees by the corporations or persons over whose lines of railroad the cars of said The Pullman Company may be operated while I am traveling over said lines in the employment or service of said The Pullman Company; and I expressly declare that while so traveling I shall not have the rights of a passenger with respect to such corporations or persons, which rights I do expressly renounce; and I hereby, for myself, my heirs, executors, administrators or legal representatives, forever release, acquit, and discharge any and all such corporations and persons from all claims for liability of any nature or character whatsoever on account of any personal injury or death to me while in said employment or service."

This appeal turns upon two questions:

First. Was plaintiff, at the time of the injury, an employee of defendant railroad company, and, as such, entitled to maintain his action under the provisions of the Employers' Liability Act of April 22, 1908 (35 Stats. L., 65, c. 149)?

Second. Does the contract of employment between plaintiff and The Pullman Company constitute a bar to recovery against the railroad company?

Section 1 of the act of 1908 provides: "That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the several States and Territories, or between the District of Columbia, and any of the States or Territories, * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." It is unnecessary to enter into a discussion of the rules of construction applicable to this act. While it is in derogation of the common law, it should be construed so as to give effect to the evident intent of Congress. Johnson v. Southern Pac. Co., 196 U. S. 1. It applies broadly to any employee of a railroad company injured while engaged in interstate commerce. Of course, if plaintiff was in the employ of defendant at the time of the accident, he would be entitled to maintain his action

under section 5 of the act of 1908, irrespective of the contract of employment. Hence, the case turns solely upon the nature of plaintiff's employment.

The contract between The Pullman Company and the Baltimore & Ohio Railroad Company, whereby the latter company agreed to operate parlor and sleeping cars, was substantially a contract on the part of the railroad company to haul the cars of The Pullman Company. The material stipulations of the agreement were that The Pullman Company should "furnish sleeping and parlor cars properly equipped and acceptable to the railroad company sufficient * * * to meet the requirements of travel over" the railroad company's lines that The Pullman Company should keep its cars in good order and repair; that it should "have the right to collect from the occupants of Pullman cars, for the use of seats and berths therein, such fares as are customary on competing lines of railroad," and that The Pullman Company should "furnish agents or inspectors to supervise the conduct of employees, cleanliness of cars, etc., while en route, and the railroad company will transport free over its own lines the employees, agents or inspectors" of The Pullman Company. The railroad company agreed that its ticket agents, at such offices as should be agreed upon, should "sell tickets for seats and berths in such cars without charge to The Pullman Company;" that "the railroad company shall haul the cars furnished by The Pullman Company under this agreement on its passenger trains in such manner as may be necessary to meet the requirements of travel," and "shall not be entitled to receive compensation from The Pullman Company for the movement of cars furnished under this agreement."

The Pullman Company employed plaintiff in the capacity of porter, and he was acting as such in one of the company's cars at the time he was injured. The car was not operated nor controlled by defendant. Defendant, under its agreements with The Pullman Company, was simply hauling the car. True, it was hauled for the accommodation of the passengers traveling upon defendant's train; but the railroad company assumed no responsibility for the management of the car or its equipment. The Pullman Company sold passengers the tickets which entitled them to the privileges of its car. The proceeds went to The Pullman Company. Its conductor and porter looked after the accommodation of the passengers while in and about the car. In fact, so far as the control of the car was concerned, it was as complete as if the entire train had been operated by The Pullman Company. The railroad company in its contract with its passengers did nothing that limited The Pullman Company's control of its cars. The duty which the railroad company assumed to carry its passengers safely, whether in its cars or in the cars of The Pullman Company, arose from its contract in the sale of tickets entitling them to transportation, and not from their purchase from The Pullman Company of tickets entitling them to the additional privilege of riding in its cars.

Plaintiff insists that at the time of the accident he stood in the relation of an employee of defendant company, and bases his con-

tention chiefly upon a suggestion in the decision in the case of Baltimore & Ohio R. R. Co. v. Voigt, 176 U. S., 498. In that case, an express messenger had been injured through the alleged negligence of the railroad company. As a condition of his employment by the express company he had executed a release exempting the railroad company from liability for injuries he might sustain as an express messenger on the railroad. The release was held to constitute a bar to recovery against the railroad company. Importance is attached, however, to the following statement of the court: "The relation of an express messenger to the transportation company, in cases like the present one, seems to us to more nearly resemble that of an employee than that of a passenger. His position is one created by an agreement between the express company and the railroad company, adjusting the terms of a joint business—the transportation and delivery of express matter. His duties of personal control and custody of the goods and packages, if not performed by an express messenger, would have to be performed by one in the immediate service of the railroad company. And, of course, if his position was that of a common employee of both companies, he could not recover for injuries caused, as would appear to have been the present case, by the negligence of fellow-servants."

It will be observed that the court did not say that the express messenger was an employee of the railroad company. In distinguishing his position from a passenger it said it seemed to "more nearly resemble that of an employee than that of a passenger." The same distinction was made as to a Pullman porter by this court in Hughson v. Richmond & D. R. Co., 2 App. D. C., 98, where it was held that a Pullman porter was not an employee of the railroad company. The court, speaking through Chief Justice Alvey, said: "But though the plaintiff was not a servant of the railroad company, and therefore not a coservant with the employees of that company, and consequently not subject to the principle of non-liability of the master for the negligence of his servant producing an injury to a fellow-servant, yet the plaintiff was not a passenger in any such sense as to require of the railroad company the highest degree of skill and care in the construction and maintenance of its roadway and machinery, and the operation of its road and the running of its trains, such as are required in the case of a passenger."

In their relation to the railroad company, we think there is a marked distinction between an express messenger and a Pullman porter. As was suggested in the Voigt case, the express messenger occupied a position created by agreement between the express company and the railroad company. He performed duties which, if not performed by him, would have to be performed by the railroad employees. Express matter, when received by the railroad company under its contract with the express company, like freight, has to be handled and cared for. If not looked after by the agents of the express company, the duty would devolve upon the employees of the railroad company. Not so with a Pullman car. It is a vehicle of a common carrier independent of the railroad company.

The mere fact that The Pullman Company employs the railroad company to haul its cars does not affect its relation to the public. The railroad company is not under obligation to haul Pullman cars, as it is at common law to carry passengers and freight. Russell v. Pittsburgh, C., C. & St. L. Ry. Co., 157 Ind., 305. Passengers occupy Pullman cars under contract with The Pullman Company, and not the railroad company. The service rendered by the porter forms no part of the contractual duty of the railroad company to its passengers. "It is no part of the contract or obligation of a common carrier of passengers to furnish berths, or the services of a porter to make up beds or perform other services for passengers. The passenger pays The Pullman Company for the services performed by it, and not the railroad company, and if one desires such services as are rendered by The Pullman Company and its porter he must contract with that company for them." Chicago, R. I. & P. Ry. Co. v. Hamler, 215 Ill., 525. On the other hand, the porter performs no service connected with the operation of the train by the railroad company. In fact, when a passenger purchases a berth in a Pullman car he must look entirely to The Pullman Company for the services of a porter. In 12 Am. & Eng. Enc. of Law, 2nd Ed., 994, the rule is laid down that, "where a palace car is run as part of a train under a contract between the palace car company and the railroad company, the employees of the two companies are not, it has been held, fellow-servants," citing Hughson v. Richmond & D. R. Co., supra. This rule has been followed in McDermon v. Southern Pacific Ry. Co., 122 Fed., 669; Russell v. Pittsburgh, C., C. & St. L. Ry Co. v. Hamler, supra; Denver & Rio Grande R. Co. v. Whan, 39 Colo., 230.

Counsel for plaintiff place strong reliance upon the decision in the case of Oliver v. Northern Pac. Ry. Co., 196 Fed., 432. In that case the railroad company and The Pullman Company were the joint owners of the Pullman car in which Oliver, the porter, was killed. The car was owned by the two companies under a contract which, among other things, provided: "The cars owned jointly by the railroad company and The Pullman Company shall be known as association cars. The Pullman Company having the management thereof; and all obligations of The Pullman Company with respect to the operation of said cars shall be assumed and borne by the Association. * * * The Association shall furnish with each of such sleeping cars, one or more employees, as may be required, whose duties shall be to collect fares from passengers occupying such cars, and for the use of seats or berths, and generally to wait upon and provide for the comfort of passengers therein; such employees at all times to be subject to the rules of the railroad company governing its own employees. The Association shall also furnish employees who shall have charge of all sleeping cars used under this contract." Distinguishing that case from the cases of the class to which the one at bar belongs, the court said: "The relations existing between the railway company and The Pullman Company in this case, and consequently the relations existing between the railway company and the porter on the Pullman car,

differ widely from those disclosed in the numerous cases cited in argument, where it was held that a porter on a Pullman car was not an employee of the railroad company over whose tracks the Pullman car was operated." After discussing the contract by which the Association, consisting of The Pullman Company and the railway company, had been formed, the court further said: "It will thus be seen that the railway company was the owner of a half interest of the Pullman car upon which the deceased porter was employed, and that the deceased was employed by an Association of which the railway company was a part. True, The Pullman Company was the manager for the Association, but in that respect it was simply an agent for the railway company. Stripped of matters of mere form, the railway company and The Pullman Company operated this car jointly for their own benefit, and employed the porter jointly." It thus appears that there is no such analogy between the two cases as will afford any relief to plaintiff.

This brings us to the contract of employment. It is not in conflict with section 5 of the act of 1908, which provides: "That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void." This provision must be construed in connection with the act which relates alone to railroad employees engaged in interstate commerce. Plaintiff, not occupying that relation to defendant, can not avail himself of it to defeat his contract of employment. Stripped therefore of all connection with the act of 1908, the contract of employment furnishes a complete bar to plaintiff's right to recover in this action. Voigt v. B. & O. R. Co., supra.

There is no importance to be attached to the mere fact that after the execution of the contract of employment plaintiff's salary was increased, and he was assigned the additional duty of occasionally collecting railroad tickets. This did not relieve him from the obligations of his contract. It did not affect his waiver of right to maintain this action against defendant company. He was originally employed as a Pullman porter, and at the time of the alleged accident still retained that position.

The other errors assigned are of no importance, and will not be considered. The judgment is affirmed with costs.

Affirmed.

MONDAY, *March 10th, A. D.* 1913.

January Term, 1913.

No. 2474.

GEORGE R. ROBINSON, Appellant,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued

by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be, and the same is hereby, affirmed with costs.

Per MR. JUSTICE VAN ORSDEL,
March 10, 1913.

In the Court of Appeals of the District of Columbia.

No. 2474.

GEORGE R. ROBINSON, Appellant,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, Appellee.

Now comes George R. Robinson, appellant, in the above entitled cause, by his attorneys, Alexander Wolf and Levi H. David, and moves the Court to enter an order in this cause, staying the mandate for the reason that said appellant intends to make application to the Supreme Court of the United States for the allowance of a writ of error in this cause.

ALEXANDER WOLF,
LEVI H. DAVID,
Attorneys for Appellant.

(Endorsed:) No. 2474. George R. Robinson, Appellant, vs. The Baltimore & Ohio Railroad Company. Motion of appellant to stay mandate. Court of Appeals, District of Columbia. Filed Mar. 25, 1913. Henry W. Hodges, Clerk.

In the Court of Appeals of the District of Columbia.

No. 2474.

GEORGE R. ROBINSON, Appellant,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, Corporation, Appellee.

Petition for a Writ of Error.

The petition of George R. Robinson, appellant, respectfully shows that this cause is now pending in the Court of Appeals of the District of Columbia; that a judgment was rendered therein on the tenth day of March, 1913, affirming a judgment of the Supreme Court of the District of Columbia, in favor of the appellee, The Baltimore and Ohio Railroad Company, corporation; and that this cause is one in which the construction of a general law of the United States, namely, the Act of Congress of April 22, 1908, and amendments thereto, commonly known as the Employers' Liability Act,

was drawn in question by the defendant; and that this cause is one in which the said Court of Appeals of the District of Columbia, therefore, has not final jurisdiction; and this cause is one properly to be reviewed by the Supreme Court of the United States on writ of error.

Wherefore, your petitioner prays that a writ of error be allowed in this cause directing the Clerk of the Court of Appeals of the District of Columbia to send the record and proceedings in this cause, together with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors filed herewith and herein by your petitioner, may be reviewed, and if error be found, corrected according to the laws and customs of the United States; and your petitioner also prays the court that the penalty of the bond for costs may be fixed by order of this Court.

GEORGE R. ROBINSON,
By ALEXANDER WOLF,
LEVI H. DAVID,
Attorneys for Petitioner.

(Endorsed:) No. 2474. George R. Robinson, Appellant, vs. The Baltimore and Ohio Railroad Company, Corporation, Appellee. Petition for a Writ of Error. Clerk will please file. Alexander Wolf, Levi H. David, Att'ys for appellant. Court of Appeals, District of Columbia. Filed Apr. 7, 1913. Henry W. Hodges, Clerk.

In the Court of Appeals of the District of Columbia.

No. 2474.

GEORGE R. ROBINSON, Appellant,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, Corporation, Appellee.

Assignment of Errors.

Now comes the appellant, George R. Robinson, hereinafter called the plaintiff, by his attorneys, and says that in the record, proceedings, decision, and judgment of the Court of Appeals of the District of Columbia, in this cause, there is manifest error in this:

1. The court erred in sustaining the construction of the Employers' Liability Act of the United States of April 22, 1908 (35 Stats. L., 65, c. 149), drawn in question by the appellee, hereinafter called the defendant, in holding that the said Act should be so construed as to exclude the plaintiff from the protection and benefit afforded by the terms of the said Act.

2. The court, in construing the said Act, erred in holding, that the plaintiff at the time of the injury sustained by him, while in the performance of his duties in behalf of the defendant Railroad Com-

pany, on an interstate passenger train of said defendant Company, was not, either as a matter of law, or as a matter of fact, an employé of defendant, within the meaning and proper construction of said Federal Employers' Liability Act.

3. The court erred in holding that the plaintiff was not entitled to have his case submitted to the jury to find, whether as a matter of fact, the plaintiff was an employé of the said Railroad Company, within the meaning and proper construction of said Employers' Liability Act.

4. The court erred, in the construction of the said Employers' Liability Act, in holding that the plaintiff, by reason of the decision of this court in the case of Hughson v. Richmond and Danville Railroad Company, reported in 2 Appeal Cases, D. C., page 98 (decided January 2, 1894), was not an employé of the said Railroad Company, within the meaning and proper construction of said Employers' Liability Act.

5. The court erred in holding that "there is a marked distinction between an express messenger and a Pullman Porter," under the said Employers' Liability Act.

6. The court erred in holding that a Pullman car, annexed to and forming a part of an interstate railroad train is a vehicle of a common carrier independent of the railroad company; and further erred in holding that the Pullman Company employs the railroad company to haul its car; and further erred in deciding as follows: "the mere fact that the Pullman Company employs the Railroad Company to haul its car does not affect its relation to the public."

7. The court erred in construing Section 5 of the said Employers' Liability Act, in deciding that the alleged contract of release offered by the defendant Railroad Company furnished a complete bar to the right of the plaintiff to recover in this action.

8. The court erred in holding that there is no importance to be attached to the fact that after the execution of the contract of employment between the plaintiff and the Pullman company, the salary of the plaintiff was increased, and he was assigned the additional duty of collecting railroad tickets and transportation from passengers of said Railroad Company for and on behalf of said Railroad Company.

9. The court erred in not holding, in view of the close and intimate relations of the Pullman Company and the Baltimore and Ohio Railroad Company, the joint interstate railroad business conducted by them, the acceptance by the said Railroad Company of the duties performed by the plaintiff in behalf of said Railroad Company, namely, the collection of railroad fares and transportation by the plaintiff for, and accepted by, the Railroad Company, the plaintiff was an employé of the said Railroad Company, while on its interstate train, within the true meaning and proper construction of the said Employers' Liability Act.

10. The court erred in not holding that the Pullman Company and the Baltimore and Ohio Railroad Company, defendant, operated in interstate commerce the Pullman car (in which the passengers

of the Railroad Company were being transported, and in which the plaintiff performed his duties in behalf of the Pullman Company and also in behalf of the said Railroad Company) jointly for the benefit of said two Companies; and erred in not holding that the plaintiff was employed jointly and severally by said two companies.

11. The court erred in holding that the contract of employment between the plaintiff and the Pullman Company, whereby the plaintiff agreed to assume all risks of accident and agreed to indemnify the Pullman Company for any moneys paid by it to the said Railroad Company in consequence of injury or death happening to him, bars recovery by the plaintiff against the said Railroad Company under said Employers' Liability Act.

12. The court erred in not construing the language of the said Employers' Liability Act, namely, "any person suffering injury while he is employed by such carrier in such commerce," to mean that plaintiff was such person while he was collecting railroad transportation from the passengers of the Railroad Company, riding in the Pullman car annexed to and forming a part of the interstate train of said Railroad Company.

13. The court erred in holding that the Pullman car, annexed to and forming a part of defendant's interstate train, under the contract between the two companies, was not operated or controlled by the defendant railroad company; and further erred in deciding that the defendant was simply hauling the car and assumed no responsibility for the management of the car or its equipment.

14. The court erred in holding that the service rendered by the plaintiff to defendant's passengers in the Pullman car, formed no part of the contractual duty of the railroad company to its passengers.

15. The Court of Appeals erred in not holding that the ruling of the Supreme Court of the District of Columbia, before the trial, sustaining plaintiff's demurrer to defendant's amended plea (setting forth the alleged release) constituted the law of the case.

16. The court erred in not holding that the plaintiff's evidence show sufficient negligence upon the part of the defendant or its officers, agents or servants.

17. The court erred in not holding that the motion of the plaintiff before the jury was instructed by the trial court to render a verdict for the defendant, to submit the case to the jury subject to the opinion of the court on the law was improperly overruled.

18. The court erred in not holding that the trial court committed error of law in instructing the jury to return a verdict for the defendant.

19. The court erred in not holding that the trial court committed error of law in permitting the defendant to introduce, on cross examination of the plaintiff, the written contract of employment between the plaintiff and the Pullman Company, containing the alleged release.

20. The court erred in affirming the judgment of the Supreme Court of the District of Columbia.

Wherefore, the said George R. Robinson prays that a writ of error

may be allowed in this cause to refer that the judgment of the Court of Appeals of the District of Columbia may be reversed and so much by the Supreme Court of the United States.

GEORGE HOWARD WOLF,
LEVI M. DAVID,
Attorneys for George H. Robinson.

(Endorsed:) In Court of Appeals D. C. No. 3978. George H. Robinson, Appellant, vs. The Baltimore & Ohio Railroad Company, Appellee. Assignment of Errors. Filed, with clause &c. Wm. Miller Wolf, Levi M. David, Attorneys for Appellant. Court of Appeals, District of Columbia. Filed Apr. 7, 1910. Henry W. Hodges, Clerk.

WASHINGTON, *April 6th, A. D. 1910.*

No. 3978.

GEORGE H. ROBINSON, *Appellant,*
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation.

The motion for the allowance of a writ of error to remove the above entitled cause to the Supreme Court of the United States and to stay the mandate, was submitted to the consideration of the Court by Mr. L. M. David of counsel for the appellant in support of motion.

WASHINGTON, *April 6th, A. D. 1910.*

No. 3978.

GEORGE H. ROBINSON, *Appellant,*
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation.

On consideration of the motion for the allowance of a writ of error to remove the above entitled cause to the Supreme Court of the United States, It is by the Court this day ordered that said motion be and the same is hereby denied. And it is further ordered that the mandate in said cause be and the same is hereby stayed until further order.

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judges of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between George H. Robinson, appellant, and Baltimore & Ohio Railroad Company, appellee, a manifest error hath

happened, to the great damage of the said appellant, George R. Robinson, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 29th day of April, in the year of our Lord one thousand nine hundred and thirteen.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by

EDWARD D. WHITE,
Chief Justice of the United States.

Know all Men by these Presents, That we, George R. Robinson, of Washington, District of Columbia, as principal, and Southwestern Surety Company of Oklahoma, a corporation, as surety, are held and firmly bound unto The Baltimore and Ohio Railroad Company, a corporation in the full and just sum of Three hundred dollars to be paid to the said The Baltimore and Ohio Railroad Company, a Corporation, its certain attorney, executors, administrators, or assigns: to which payment, well and truly to *to* be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twenty-eighth day of April, in the year of our Lord one thousand nine hundred and thirteen.

Whereas, lately at a session of the Court of Appeals of the District of Columbia, in a suit depending in said Court, between said George R. Robinson as plaintiff and The Baltimore and Ohio Railroad Company, a corporation as defendant a judgment was rendered against the said George R. Robinson and the said George R. Robinson having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said The Baltimore and Ohio Railroad Company, a corporation, citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if the said George R. Robinson shall prosecute said writ of error to effect, and

answer all costs if he fails to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

GEORGE R. ROBINSON. [SEAL.]
SOUTHWESTERN SURETY INSURANCE COMPANY, [SEAL.]
By WILLIS W. PARKER, [SEAL.]
Attorney in Fact.

[Seal of Southwestern Surety Insurance Company.]

Sealed and delivered in the presence of—

WILLIAM BRADFIELD,
As to George R. Robinson.
C. L. DAWLING.

Approved by—

EDWARD D. WHITE,
Chief Justice of the United States.

[Endorsed:] No. 2474. George R. Robinson, Appellant, vs. The Baltimore and Ohio Railroad Company, a Corporation. Bond on Writ of Error to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Apr. 30, 1913. Henry W. Hodges, clerk.

UNITED STATES OF AMERICA, *ss:*

To Baltimore & Ohio Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein George R. Robinson is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 29th day of April, in the year of our Lord one thousand nine hundred and thirteen.

EDWARD D. WHITE,
Chief Justice of the United States.

Service acknowledged this 29th day of April 1913.

GEORGE E. HAMILTON,
JOHN W. YERKES &
JOHN J. HAMILTON,
Att'ys for B. & O. R. R. Co.

[Endorsed:] Court of Appeals, District of Columbia. Filed Apr. 30, 1913. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 70 inclusive contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of George R. Robinson, appellant, vs. The Baltimore and Ohio Railroad Company, a corporation, No. 2474, April Term, 1913, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 30th day of April A. D. 1913.

[Seal Court of Appeals, District of Columbia, 1893.]

HENRY W. HODGES,
Clerk of the Court of Appeals
of the District of Columbia.

Endorsed on cover: File No. 23,674. District of Columbia Court of Appeals. Term No. 542. George R. Robinson, plaintiff in error, vs. The Baltimore & Ohio Railroad Company. Filed May 5th, 1913. File No. 23,674.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 167.

GEORGE R. ROBINSON, PLAINTIFF IN ERROR,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY,
A CORPORATION, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF IN BEHALF OF PLAINTIFF IN ERROR.

ALEXANDER WOLF,
LEVI H. DAVID,
Attorneys for Plaintiff in Error.

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IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF IN BEHALF OF PLAINTIFF IN ERROR.

Statement of the Case.

This case comes up from the court of appeals of the District of Columbia on a writ of error allowed by the Chief Justice of this court (Record, 63-64), to review a judgment of the said court of appeals, affirming a judgment of the supreme court of the District of Columbia, on a directed verdict of a jury in favor of the defendant in error, in which

the construction of the Federal Employers' Liability Act of April 22, 1908 (35 Stat. L., 65, c. 149, as amended by the Act of April 5, 1910, 36 Stat., c. 143), was drawn in question by the defendant, The Baltimore & Ohio Railroad Company, defendant in error in this court.

In support of the petition presented to the Chief Justice of this Court, by the plaintiff in error, who was the plaintiff in the trial court, the supreme court of the District of Columbia, and the appellant in the court of appeals of said District of Columbia, the following cases were cited, and are now, relied upon:

United States ex. Kaiel, 211 U. S., 370.
United States ex. Mowatt, 215 U. S., 26.
United States ex. Stevenson, 215 U. S., 190.
United States ex. Corbett, 215 U. S., 233.
United States ex. Colorado Anthracite Co., 225 U. S., 259.

On August 30, 1910, the plaintiff in error filed his suit at law in the supreme court of the District of Columbia, against the defendant in error (Record, 1-7) to recover damages in the sum of $17,000, for permanent personal injuries, sustained by him shortly after 2:27 o'clock, a. m., April 24, 1910, while the plaintiff in error, a "porter in charge," was engaged in the performance of his duties as such Pullman porter and also in the collection of railroad transportation and Pullman fares from passengers of the defendant in error, traveling in a Pullman car, known as the "Milan," which formed part of a passenger train No. 7 of defendant in error, operating in interstate commerce between Washington, D. C., and Wheeling, West Virginia (Record 26, 32, 39). See also opinion of the court of appeals (Record, 52), and the ruling of the trial court (Record, 39).

The accident which occasioned the injuries to the plaintiff in error, occurred near the "Wickwire Bridge," which is

three or four miles east of Fetterman, West Virginia (Record, 40); it was produced by a rear-end collision with said passenger train No. 7, of the defendant in error, while on its way to Wheeling, West Virginia, by an engine (No. 2110), to which was attached a caboose, owned and operated by the defendant in error, by and through the alleged negligent, reckless, and unlawful propulsion of said engine No. 2110, by the defendant, its agents, servants and employees.

The plaintiff's declaration contains three counts. The first count (Record, 1-3) charges, substantially, that the defendant, on or about April [illegible], 1910, was, and still is a common carrier by railroad, engaged as such in the transportation of passengers and persons lawfully in and upon sleeping cars, or Pullman coaches, annexed to and forming a part of defendant's passenger train of cars, operated on defendant's line of railroad running from the City of Washington, D. C., to the City of Wheeling, State of West Virginia; that the plaintiff, at the time mentioned, was employed as a porter by the Pullman Company, in a sleeping car known as the "Milton," belonging to said Pullman Company, for the comfort, convenience and protection of the defendant's passengers in said car "Milton," by virtue of and in accordance with a certain agreement by and between the Pullman Company and the defendant; that said Pullman car was attached to and formed a part of a passenger train of cars of the defendant Company, in accordance with said agreement; that said train left the City of Washington, D. C., on, to wit: April [illegible], 1910, bound for Wheeling, West Virginia, and other points in different States; that while the plaintiff was lawfully seated in the said car "Milton" in the due course of his employment as said porter for the comfort, convenience and protection of the passengers of the defendant in said car "Milton," and while said train was moving between the town of Grafton, West Virginia, and the town of Fetterman, West Virginia, the defendant, by its servants, agents and employees, did recklessly, carelessly, negligently, improperly and unlawfully, drive and propel

another of its engines into and against the defendant's passenger train aforesaid, and with great force and violence, defendant's said engine collided into the Pullman car "Milton," producing a rear-end collision, whereby and by reason whereof the plaintiff was seriously and permanently hurt and injured. (A description of the permanent injuries sustained by the plaintiff is set forth in each of the counts of the declaration), (Record, 3, 4, 6).

The second count (Record, 3-5) alleges that the plaintiff was rightfully and lawfully in a Pullman car known as "Milton," which formed a part of the train of cars of the defendant, over its line of railroad, moving in interstate commerce from Washington, D. C., to Wheeling, West Virginia, and the second count differs from the first count in this: The second count does not set forth that the plaintiff was a porter, but charges that the plaintiff was then lawfully and rightfully in and upon the said Pullman car or coach "Milton," which formed a part of the defendant's train as aforesaid, which said Pullman car was under the direction, management and control of the defendant, and the plaintiff was then being transported in the said Pullman car by the defendant; that the defendant, by its agents, etc., did carelessly, negligently, etc., drive, move and propel one of its engines into said passenger train, striking said car "Milton," producing a rear-end collision, whereby plaintiff was thrown violently out of his seat and was permanently injured.

The third count (Record, 5-7) sets forth similar allegations contained in the first count with reference to the interstate commerce business by railroad of the defendant, and differs from the other counts in this: that the Pullman Company, a corporation, was the owner of certain railway cars known as drawing room cars, parlor and sleeping cars, and the defendant engaged with the Pullman Company, in a joint business by virtue of a certain contract between said named companies, whereby the Pullman Company furnished and provided to the defendant certain drawing room cars,

parlor and sleeping cars, which were annexed to and then and there formed a part of the passenger train of cars of the defendant company, for the purpose of the accommodation of the passengers of the defendant, and also other persons, including the plaintiff as a porter in one of the said Pullman cars, for the comfort, convenience and protection of the passengers of the defendant, *all for the mutual and joint benefit and financial interest of the said two named corporations;* and that in pursuance of the said joint business of the two companies, the plaintiff was employed and he did perform, and he was performing his duties in one of said Pullman cars, to wit: "Milton," which was annexed to and formed a part of the defendant's said passenger train, under the contract aforesaid between the two companies, and as such porter on said car, *the plaintiff was a common employee of said defendant and said Pullman Company;* that the train to which the car "Milton" was attached as aforesaid, left Washington, D. C., on, to wit: April 9, 1910, bound for Wheeling, West Virginia, and other cities in different States of the United States, and while the plaintiff was so engaged as such porter, protecting the passengers of the defendant in said car "Milton" in the due course of his employment and in the proper discharge of his duties, and while he was seated in the said car "Milton," and while the defendant's passenger train was moving between Grafton, West Virginia, and Fairmont, West Virginia, and without any fault whatever upon the part of the plaintiff, the defendant, by its officers, agents, servants and employees, *fellow servants of the plaintiff,* did recklessly, carelessly, negligently, improperly and unlawfully drive, move and propel another of its engines into and against said passenger train, which produced a rear-end collision and said car "Milton" was destroyed, and by reason whereof the plaintiff was injured, etc.

The plaintiff produced as witnesses in his behalf, two physicians and surgeons; and by their testimony, "the plaintiff sustained the allegations set forth in the declaration in this case in regard to the plaintiff's said injuries" (Record, 47).

On September 29, 1910, the defendant in error filed a general issue plea to each count of plaintiff's declaration, and on the same date, plaintiff joined issue, and notice of trial given (Record, 7).

Defendant's Special Plea.

Thereafter, on October 21, 1910, defendant obtained leave and filed a special plea (Record, 7) in which, after setting forth that the Baltimore and Ohio Railroad Company, on the date of the collision and accident referred to in the declaration, was, and for some years prior thereto had been, engaged in the operation of its trains, as a common carrier by railroad, as set forth in the declaration, it alleged:

> (1) That at the time of the accident in question and for a long time prior thereto, the defendant was under contract with The Pullman Company to attach to its trains, and haul as a part thereof, various sleeping and parlor cars belonging to the said The Pullman Company, *of sufficient number to accommodate the needs of the passengers using the defendant's passenger trains*, and to carry on each of said Pullman cars so attached to defendant's trains as aforesaid, free of charge, one or more employees of said The Pullman Company as might be necessary to collect fare for said The Pullman Company, from said railroad passengers occupying said cars, due the said The Pullman Company for the use of seats or berths therein, *and generally to wait upon and provide for the comfort of passengers therein.*
>
> (2) That the plaintiff, at the time of the accident complained of, was riding as an employee of the said The Pullman Company as a porter * * * whose duties, under his contract of employment, were that he should wait upon and provide for the comfort of passengers therein and generally to look after said car upon which *he was then and there being carried under the terms and conditions of the contract between The Pullman Company and this defendant.*
>
> (3) That on, to wit, November 17, 1905, a contract of employment was entered into between the

plaintiff and said The Pullman Company, voluntarily subscribed by the plaintiff, and containing the following undertaking, agreement, promise, and release on his part:

Sixth. I will obey all rules and regulations made or to be made, for the government of their own employees by the corporations or persons over whose lines of railroad the cars of said The Pullman Company may be operated while I am traveling over said lines in the employment or service of said The Pullman Company; and I expressly declare that while so traveling I shall not have the rights of a passenger with respect to such corporations or persons, which rights I do expressly renounce; and I hereby for myself, my heirs, executors, administrators, or legal representatives, forever release, acquit and discharge any and all such corporations and persons from all claims for liability of any nature or character whatsoever on account of any personal injury or death to me while in said employment or service.

I have read and understand every word of this paper.

"'GEORGE R. ROBINSON. [SEAL.]'

and that, at the time of the accident complained of, the plaintiff was an employee, servant or agent of the said The Pullman Company, *under said contract hereinbefore set forth*, and was connected with the said The Pullman Company and acting for it, and about its business, and was traveling upon the defendant's railroad at said time exclusively upon business of the said The Pullman Company, upon free transportation, and without the payment of fare, as aforesaid; and

(4) That at the time of the collision, accident and injury set forth in the declaration, and its several counts, this defendant permitted and allowed the plaintiff to ride upon its trains, not as a passenger for hire, but on transportation furnished by this defendant, relying upon the provisions contained in said contract of employment as aforesaid.

(5) That plaintiff knew of the said contract between The Pullman Company and the defendant.

Plaintiff's Demurrer to Special Plea Sustained.

To the defendant's special plea the plaintiff filed a demurrer (Record, 10), upon the ground, *inter alia:*

That the act of Congress, entitled an act relating to the liability of common carriers by railroad to their employees in certain cases, approved April 22, 1908, and particularly section 5 thereof, make void the contract, rule, regulation or device, as alleged in said plea, the purpose or intent of which was, or is, as alleged in said plea, to enable the defendant to exempt itself from liability created by said act.

The demurrer coming on to be heard, and after argument by counsel for the respective parties, the Supreme Court of the District of Columbia, per Mr. Justice Anderson, on February 17, 1911, sustained the plaintiff's demurrer, with leave to the defendant to amend the said additional plea within 15 days (Record, 11).

On March 2, 1911, Justice Anderson filed a written opinion, setting forth fully his reasons for sustaining the plaintiff's demurrer, *which opinion was filed by the court as a part of the record of this case.* It is set out, in its entirety, in the transcript (Record, 11-18).

Justice Anderson decided that the plaintiff, a porter of the Pullman Company, upon a car owned by it, but constituting a part of the train of the railroad company, *the plaintiff being expressly obligated to obey all rules and regulations made or to be made by the railroad company for the government of its own employees, was, in consequence of the joint business conducted by the Pullman Company and the railroad company, an employee of the railroad company;* and, as such, is within the protection of the Employers' Liability Act of April 22, 1908 (35 Stat. L., 65), by which the benefits are extended to "any person suffering injury while he is employed by such carrier," etc., and that in view of section 5 of the act, the release pleaded is void. (The opinion of Justice Anderson is also reported in 39 Washington Law Reporter, 242.)

On March 2, 1911, the defendant obtained an order extending the time until March 20, 1911, to "amend its additional plea" (Record, 11), but it never availed itself of that benefit.

No action whatever was taken by the defendant to have the order sustaining plaintiff's demurrer reviewed.

The defendant did not even note an exception to the ruling or the order of the court; and although the defendant thereby acquiesced in the order of the court, and the law of the case was thus apparently settled, at least so far as the trial court was concerned, yet, at the trial of the case, *because the trial judge disagreed with the ruling and order of Justice Anderson,* the defendant in error was allowed, over the objection and exception of plaintiff (Record, 37-39), to put in evidence the alleged release, which had been rejected by the previous order of the same court. *The trial judge even permitted the defendant to put said alleged release in evidence as a part of the plaintiff's case in chief, over the objection and exception of plaintiff,* but declined to allow the defendant to refile the plea, which had been previously stricken out (Record, 39).

The Evidence.

The plaintiff introduced in evidence the written agreement, dated January 1, 1907, and in force at the time of the accident, between the Pullman Company and the Baltimore and Ohio Railroad Company (Record, 26-30), which was produced at the trial by the defendant, pursuant to an order of the court, on motion of the plaintiff.

This agreement, adjusting the terms of a joint business for the mutual financial benefit and advantage of The Pullman Company and the defendant railroad company, provides (section 1) for the furnishing by the former company of sleeping and parlor cars, properly equipped and acceptable to the railroad company to meet the requirements

of travel over the lines of railroad owned or controlled by the Baltimore and Ohio Railroad Company, and over all additional railroads which it may thereafter own or control; and in case the railroad company shall at any time desire to operate its own parlor cars and café cars, either exclusively or in addition to those furnished by The Pullman Company, it shall have the right to do so.

"SECTION 3. The Pullman Company shall have the right to collect from the occupants of Pullman cars, for the use of seats and berths therein, such fares as are customary on competing lines of railroad where equal accommodations are furnished, and shall provide the necessary employees, who shall be subject to the rules of the Railroad Company governing its own employees.

"The Pullman Company, in order to maintain service acceptable to the Railroad Company and the traveling public, shall furnish agents or inspectors to supervise the conduct of employees, cleanliness of cars, etc., while en route and the Railroad Company will transport free over its own lines the employees, agents or inspectors mentioned in this section.

"SECTION 4. The Railroad Company shall pay to the Pullman Company the cost of repairing and making good all damages to any of its cars resulting from accident or casualty or fire on the lines of the Railroad Company, and on any other roads with which The Pullman Company has no operating contract upon which any such cars may be run by direction of the Railroad Company, except damages resulting from accident or casualty or fire originating inside of said cars, or from the negligence of the employees of the Pullman Company in the line of their employment. Where damage from accident or casualty or fire, for which the Railroad Company is responsible, is repaired by The Pullman Company, bills shall be rendered to the Railroad Company for the cost of such work with an addition of ten per cent (10%).

"SECTION. 5. The Railroad Company shall promptly make such repairs as may be necessary to put any of such cars in good order whenever re-

quested by The Pullman Company so to do, and shall, without request, make such repairs as may be required at any time to insure the safety of such cars, and shall at the end of each month render therefor to The Pullman Company bills for the cost of such repairs with an addition of ten per cent (10%), except as provided for in section 4 hereof.

"SECTION 6. The Railroad Company shall furnish free of charge at convenient points rooms and necessary facilities for airing and storing bedding, linen, supplies and other movables belonging to or designed for the use of such cars, and shall wash and clean the outside of such cars, and shall furnish and apply necessary lubricating material, ice, water, and materials for heating and lighting.

"SECTION 7. The Railroad Company shall require its ticket agents, at such offices as may be mutually agreed upon, to sell tickets for seats and berths in such cars without charge to the Pullman Company, the proceeds of such sales to be at the risk of the Pullman Company."

Section 8 provides that the two companies shall, so far as they lawfully may, furnish free passes to the general and division officers of the respective companies.

Section 9 provides:

"If any of The Pullman Company's employees furnished with any of its sleeping or parlor cars operated under this agreement shall be injured or killed in consequence of a railroad accident or casualty when serving in the line of his duties, the Railroad Company shall save harmless The Pullman Company from damages, costs and expenses growing out of or incident to such injury or death, to the extent that the Railroad Company would be liable if such employee were in fact an employee of the Railroad Company when so injured or killed, and The Pullman Company shall save harmless the Railroad Company from such damages, costs and expenses to any greater extent, each party to have immediate notice from the other of any claim or suit for any injury or death, and the right to resist or defend such claim or suit.

"SECTION 10. The Pullman Company will indemnify the Railroad Company against all costs, charges and expenses incidental to any claims for infringement of patent rights in the construction and use of any of the cars and their appliances which may be furnished and used by The Pullman Company upon the roads of the Railroad Company under this agreement. It is, however, expressly agreed that the Railroad Company will provide lawful right to use patents for such running gear, platforms, brakes, etc., on the said cars as it may specially order to be attached thereto for the purpose of conforming with its standards, where appliances are protected by patents and The Pullman Company has no authority for their use; and the Railroad Company shall in every such case fully indemnify said The Pullman Company against any and all claims, suits, costs, charges and expenses it may suffer or sustain by reason of infringement in such use. The party entitled to indemnity in any matter covered by this section shall give to the other party immediate notice of any claim or suit thereon with opportunity to defend."

Section 12:

"The Railroad Company shall haul the cars furnished by The Pullman Company under this agreement on its passenger trains in such manner as may be necessary to meet the requirements of travel over the railroads now owned or controlled by the Railroad Company.

"The Railroad Company shall haul over its lines, without charge to The Pullman Company, the cars furnished under this agreement, both to and from repair shops, and to and from such other points as may be necessary for the purpose of this agreement.

"The Railroad Company shall not be entitled to receive compensation from The Pullman Company for the movement of cars furnished under this agreement, and The Pullman Company shall not be entitled to receive compensation from the Railroad Company for the use thereof."

Section 13 provides that when the gross revenue from the sale of seats and berths in the sleeping and parlor cars furnished under this agreement shall exceed an average of $7,750 per car per annum, the Pullman Company shall pay to the Railroad Company one-half of such excess over $7,750.

> "SECTION 14. If by reason of competition or legislation or other cause beyond the control of The Pullman Company, the average gross revenue of all the standard sleeping and parlor cars operated under this agreement shall be less than an average of six thousand dollars ($6,000) per car per annum and continue at such rate for two consecutive years, The Pullman Company shall have the right upon twelve (12) months' written notice, to terminate this agreement; but, in such event, the Railroad Company shall have the option of paying to The Pullman Company such sum as will with the gross revenue derived from the sale of seats and berths equal six thousand dollars ($6,000) per car per annum, during the life of this contract, or to purchase the cars then upon its lines under this agreement at a price to be determined. In case the Railroad Company should under the provisions of this Section, purchase the cars, The Pullman Company will, in case it has facilities for doing so, assist the Railroad Company in repairing the cars or building new cars when so desired; such work to be done at the Railroad Company's own expense, and upon such terms as may be mutually agreed upon."

Among other things, section 15 provides that the Pullman Company will at the end of each contract year, furnish the Railroad Company a statement showing the average earnings per car per annum of the cars furnished under this agreement, and that the Railroad Company shall have the right to verify such statements by the accounts of the Pullman Company.

Section 16 provides that this agreement shall be for the term commencing January 1, 1907, and ending January 1, 1927, unless the same shall be sooner terminated by the

mutual agreement of the parties; also that either party may cancel and terminate the said agreement by giving at any time after the expiration of 14 years from the date thereof, three years' notice of its intention to cancel and terminate the same (Record, 30).

The testimony of the plaintiff showed that between 1905 and 1908, plaintiff was an "extra" Pullman porter, with "a run all over the country" (Record, 34); that during said period his duties were those of an "ordinary porter" on Pullman coaches annexed to railroad passenger cars namely, the attention by the plaintiff of the needs and accommodations of passengers of the railroad company, occupying berths and seats in Pullman coaches, and that the salary of the plaintiff was $25 per month and "extras" or tips (Record, 32, 34).

That from November, 1908, until and including the date of the accident, April 10, 1910, plaintiff's regular "run" was on a Pullman coach, annexed to a Baltimore and Ohio passenger train, known as No. 7, between Washington, D. C., and Wheeling, W. Va. (Record, 26, 32, 34); that his train left Washington at 5:30 p. m., and was due to arrive in Wheeling at 5:35 a. m. (Record, 26). The train passed through points in Maryland (Record, 39).

In November, 1908, the plaintiff was promoted or advanced to the position of "porter in charge," receiving increased compensation, to wit, $40 (and "extras" or "tips") per month, and from said last-mentioned date to and including the date of the accident, and as such "porter in charge" the plaintiff performed additional duties, namely, *the collection from the passengers of the Baltimore and Ohio Railroad Company, Pullman fares and Baltimore and Ohio transportation* (Record, 26, 30, 32, 33, 34, 39, 40). He also performed the duties of an ordinary porter (Record, 26).

The plaintiff was asked:

> "Q. You say that your duties were, among other things, to collect fares. Fares for whom?

"A. The Baltimore and Ohio Railroad Company and the Pullman" (Record, 30).

The reason plaintiff received $40 (and extras) per month was because he "was a porter in charge, collecting railroad transportation and Pullman transportation" (Record, 32). There was a Pullman conductor and a railroad conductor on the train; when Fairmont, W. Va., was reached, at 3 a. m., the Pullman conductor would go to bed; that after the train left Washington, and until 3 a. m., the Pullman conductor collected the Pullman fares, and the train conductor collected the train fares; at that point, Fairmont, the railroad conductor has collected railroad fares from Pullman passengers, but not very often.

"A passenger getting on at that hour of the morning would want to retire, and the porters in charge have to collect the Pullman and railroad transportation; this was a daily occurrence with witness (plaintiff); that witness (plaintiff) received ticket and money from passengers" (Record, 33).

The plaintiff would make his accounting for moneys collected by the plaintiff, after 3 a. m., for B. & O. railroad transportation, to the train conductor whenever the latter would have a chance to come in plaintiff's car and settle up with plaintiff; that if plaintiff received money from passengers of the Baltimore and Ohio for railroad transportation he would turn the money over to the train conductor, and the train conductor would give a receipt to the plaintiff to be given to the passenger the next morning; the Pullman conductor took no part in the accounting between the plaintiff and the train conductor, of railroad transportation, which the plaintiff had collected for the railroad company (Record, 33); that plaintiff collected railroad transportation, and made the accounting to the train conductor, on every trip he made, and that was part of his duties (Record, 34); that prior to 1908, plaintiff did not collect passenger fares for the railroad (Record, 34).

Witness was asked how, if at all, he was equipped for the collection of fares and tickets from the B. & O. passengers, so far as the B. & O. Railroad Company was concerned, and he answered: "I had punches and checks for the Pullman and an envelope with a duplicate number which I gave at when I took the passenger's railroad transportation, and gave the passengers the duplicate number, which would show the number of their berth. At the time that they would get off or before they would get off, I would collect the slip, the receipt that I would give them for their transportation, and return their mileage or the portion of their ticket, or anything that was due them, to complete their trip—that the foregoing refers to part B. & O. and part was the Pullman." That witness started to collect the fares from passengers on behalf of the B. & O. Railroad Company, at 9 o'clock a.m.; witness received money from passengers for their transportation as B. & O. passengers; he also received from passengers B. & O. mileage, apart from Pullman transportation; that witness made accounting to the train conductor of B. & O. transportation he received from passengers; that he performed that service from November, 1908, until April 8, 1910; that no passenger could ride in the Pullman coach without railroad transportation, and B. & O. transportation being the first thing we would ask for; witness used the punch for the Pullman checks for accommodation of berths and seats" (Record, 39). The envelope, referred to, was marked on the outside, "Baltimore & Ohio Railroad Company"; "very often we could not get them [envelopes] in the Pullman office and we would have to go to the railroad office and get them" (Record, 40); sometimes the plaintiff got the envelopes from the office of the passenger agent of the B. & O. (Record, 40, 41, 42); that when plaintiff received the railroad transportation from a passenger, he would put the same in the envelope and then give the passenger a receipt (Record, 40).

The train left Wheeling, without a conductor, at 7 p. m., and the plaintiff would not see a conductor until 10:30 at

to the plaintiff; plaintiff remembers that one day he got the envelopes from the B. & O. office; the plaintiff did not get the envelopes for his conductor; "they were for my use" (Record, 41).

The defendant's passenger train No. 7, to which three Pullman coaches were annexed, left Washington April 9, 1910, 5:30 p. m. (Record, 26). The plaintiff was in the rear coach, "the Milton" (Record, 31). No. 7 was due to arrive at Grafton, W. Va., at 1:47 a. m. (April 10); being about thirteen minutes late, it arrived there at 2 a. m. Upon its stop there, the conductor, the engineer and the flagman got off, as usual, and went to the telegraph office, which is about thirty feet from the station, to receive their train orders (Record, 31). No passengers got on the train at Grafton. Train stopped there about 4 or 5 minutes, leaving Grafton at 2:04 or 2:05 a. m. Upon leaving, Mr. Crist, the flagman of No. 7, and the plaintiff "sat in opposite berths in 'the Milton'" (Record, 31). The train then proceeded towards Fairmont, W. Va. "There are stations between Grafton and Fairmont, but the train never stopped between those points" (Record, 31, 45). After Grafton, the next station is Fetterman—a distance of about two miles. The "Wickwire Bridge" is about 4½ miles from Fetterman and the station, Valley Falls, is about 7 miles from Fetterman (Record, 31).

The testimony of the plaintiff himself further shows that after leaving Grafton his train (No. 7) "proceeded as far as Fetterman, beyond Fetterman, at just about the same rate of speed they usually ran, then the train began to slow down; the slowing down of No. 7 was for about a quarter of a mile or a half mile; when the train slowed down and had run about a half mile, witness (plaintiff) heard a sound like a clap of thunder; he turned to ask what had happened and was thrown into a very dark place. His feet were wedged in. There were coal gas, gas from the car, coal dust, hot cinders, and witness (plaintiff) was almost suffocated in this dark place." Witness (plaintiff) fell back and made

an attempt to get out a number of times, but his feet being wedged in, he could not get the use of his limbs. Finally, he was successful in releasing his feet. He had on low shoes and he succeeded in pulling his feet out of the place that was closed in pulling himself out of the hole, and pulling his feet (Record, 31) out of his low quarter shoes; some one assisted witness out of this hole. An engine and a cab of the B. & O. Railroad Company ran into "the Milton." Before the collision, witness (plaintiff) saw that engine and cab of the B. & O. Railroad standing on a siding, or side-track at Fetterman; his passenger train No. 7 passed that engine and cab, while it was standing; the next time witness saw said engine and cab, it was buried in his car "Milton"; the rear end of the "Milton" was smashed in by the collision, in fact, the car burnt up (Record, 32). Crist, the flagman, who was seated opposite to the plaintiff, was killed (Record, 32). The train was about 2¼ miles from Grafton when the collision occurred (Record, 31).

The plaintiff introduced the original train sheet and two train order books, "Wheeling Division," of the defendant, which was produced in compliance with an order of court, on motion of the plaintiff (Record, 42, 44).

The said train sheet shows the movements of defendant's trains, hereinbelow mentioned, on April 10, 1910, beginning at 12:01 a. m., from Grafton, W. Va., to Wheeling, W. Va.

That the said train sheet, made by Despatcher Rushford, defendant's agent in charge of the running of defendant's trains on the Wheeling Division, between 12:01 a. m., and 8 a. m., April 10, 1910, showed that defendant's extra train, No. 2610 running light, left Grafton, W. Va., west-bound, at 1:40 a. m. April 10, 1910, and arrived at Fetterman, W. Va., at 1:47 a. m., April 10, 1910, and remained at said Fetterman until 2:17 a. m., April 10, 1910, when it proceeded westwardly; that said extra train was in charge of Conductor D. L. Wilson and Engineer George H. Hardman; and further, that train sheet failed to show that said extra train 2610 reached the next station, Valley Falls, but shows

that said extra train returned to Grafton, W. Va.; said train sheet also showed that passenger train No. 7, after leaving Grafton, W. Va., at 2:07 a. m. April 10, 1910 proceeded westwardly; under heading of "Delays Westward" at the bottom of said train sheet is this notation: "7 Rn to V. F. looking out for cow hit by 330 Ex. 2610 ran into No. seven setting fire to rear sleeper"; that Rn had reference to Fetterman & V. F. to Valley Falls; said train sheet also showed that train No. 7, engine No. 2007, was in charge of Conductor Shahan and Engineer Johnson, and that it departed from Grafton, W. Va., at 2:07 a. m., April 10, 1910, and passed Fetterman, W. Va., at 2:12 a. m., April 10, 1910, and arrived at Valley Falls, W. Va., at 2:50 a. m., April 10, 1910, and departed from Valley Falls, W. Va., at 3 a. m. on said date reaching Fairmont, W. Va., at 3:25 a. m., on said date (Record, 43).

Said train sheet also showed that defendant's extra train No. 330, engine No. 1016, running light, departed from Grafton, W. Va., at 12:25 a. m., April 10, 1910, west-bound, and passed Fetterman, W. Va., at 12:30 a. m., on said date, and arrived at Valley Falls, W. Va., at 12:55 a. m., on said date, and remained at said Valley Falls until 1:10 a. m., on said date (Record, 43).

The plaintiff also offered in evidence "train order book" of the defendant's Wheeling Division, east-end branch, produced by defendant in compliance of the order of the court on motion of the plaintiff; that said book commenced with train order No. 35, on April 8, 1910, and closed with train order No. 6, of April 10, 1910, sent at 12:58 a. m., from Wheeling, W. Va., and received by Conductor Stuck and Engineer Baugh, running train No. 330, westwardly, from Grafton, W. Va., at 1:07 a. m., April 10, 1910, at Valley Falls, W. Va., which said train order No. 6 directed said Conductor and Engineer to run the said extra train No. 330 from Valley Falls, W. Va., to Fairmont, W. Va. That in addition to said last mentioned train order book of the

defendant, the plaintiff introduced another train order book of defendant, same division, which was produced by the defendant in compliance with the order of the court, on motion of the plaintiff, which said last mentioned train order book commenced with train order No. 7, sent at 1:04 a. m., April 10, 1910, and concluded with train order No. 21, sent at 5:14 a. m., April 12, 1910. Plaintiff offered both of the said train order books in evidence, and they were received without objection. And neither of the said train order books of the defendant contained any train order whatever to extra train No. 2610 or to train No. 7, or to the conductors or engineers of either (Record, 43).

The aforesaid train order sheet, covering Sunday, April 10, 1910, from 12:01 a. m., to 12 o'clock, midnight, shows the movements of train No. 7 on said Wheeling Division, as follows: left Grafton, W. Va., 2:07 a. m.; passed Fetterman, W. Va. 2:12 a. m.; arrived at Valley Falls, W. Va., 2:50 a. m., departed 3 a. m., passed Colfax Tower 3:11 a. m.; passed Benton Ferry, W. Va. 3:16 a. m.; passed Gaston Junction, W. Va., 3:21 a. m. and arrived at Fairmont, W. Va., at 3:25 a. m., and left Fairmont at 3:45 a. m. (Record, 44).

The deposition of George H. Hardman, defendant's engineer of its extra train No. 2610, that ran into No. 7 on the occasion in question, was taken by the plaintiff, counsel for the plaintiff and defendant being present at the examination.

Hardman testified (Record, 44-47) that on April 10, 1910, he was employed by the defendant company, as an engineer on the Wheeling Division, running between Grafton, W. Va., and Wheeling, W. Va., and had been employed on that Division for about 12 years (Record, 44); that he was running "extra 2610," an engine of the fourth class, of the B. & O. R. R. Co., between Grafton and Fairmont, W. Va., on the morning of April 10, 1910, under orders of the chief caller; that before leaving Grafton, he reported to the Despatcher of the defendant company for orders, and

received from him a "clearance," which is a card that shows there are no orders, but means "to proceed" with your train; that he proceeded to Fetterman, the next telegraph station, on said clearance, and laid there for passenger train No. 7 to pass; that he had what is called a "light engine," without a train, except the caboose. He reported the arrival of his train at Fetterman, W. Va., to the telegraph office (Record, 44) [which arrival is shown by the train sheet to have been at 1:47 a. m. (Record, 42-43)]. He "backed in out of the way of No. 7 into the siding to wait for No. 7" (Record, 44); and he waited with his engine on said siding for No. 7 to pass his engine (Record, 45). He knew the regular schedule time of passenger train No. 7 in April, 1910; that the schedule time of No. 7 between Fetterman and Valley Falls is nine minutes. No. 7 was due at Fetterman at about 2 a. m.; on April 10, 1910, No. 7 was late. "I remember that No. 7 passed through Fetterman at 2:12 a. m." The rate of speed of No. 7 between Grafton and Fairmont varies from 35 to 55 miles an hour, *and it did not usually stop between Grafton and Fairmont*" (Record, 45).

Between 5 and 6 minutes after No. 7 passed Fetterman, *the operator gave witness a clearance and a white signal to proceed which "showed me that I had a clear track; to go on; had permission to go"* (Record, 45). The rule at that time was that an inferior train should keep at least 5 minutes off the time of a superior train going in the same direction; that No. 7, at that time, was traveling west; after No. 7 passed through Fetterman on said morning of April 10, 1910, witness waited in the telegraph office at Fetterman, talking to the operator, up until the time witness left (Record, 45); that at that time the rule of the company allowed witness to proceed with his engine behind No. 7 after 5 minutes had elapsed; *that witness did not receive any orders from the train despatcher, or from any official of the B. & O. R. Co., on the occasion in question, concerning the condition of the track between Fetterman and Fairmont* (Record, 45). *He received no train orders, except the clearance,*

which gave him the right to proceed without any further orders (Record, 45).

Hardman further testified that engineers on through trains, both passenger and freight, run their trains under the direction of the Train Despatcher, through the telegraph operators, and that all train orders are issued to trainmen under the initials of the Superintendent (Record, 45); that No. 7, as it passed Fetterman on the occasion in question, was running at its usual speed through the yard limits, running about 15 miles an hour (Record, 45-46). After No. 7 had passed Fetterman, witness stayed there until he received this clear signal, which informed him that his time had expired and that he was at liberty to proceed with his engine. *Said signal did not mean that the track was clear as we did not have the block signal at that time between Fairmont and Grafton; said signal merely meant that No. 7 had been gone 5 minutes* (Record, 46); *that the telegraph operator at Fetterman, on said occasion, "gave witness no information to the effect that passenger train No. 7 was going to run slowly or stop near the Wickwire Bridge on that night"* (Record, 46). The "Wickwire Bridge" is about 3 miles west of Fetterman as nearly as witness remembers, and it would not take quite five minutes for No. 7 to run from Fetterman to the "Wickwire Bridge"—they have a seven-mile run there in nine minutes (Record, 46).

Witness drove his engine around the big curve at "Wickwire Bridge" on the occasion in question, and the first thing he saw was No. 7's deck lights, and witness' engine was then within about 30 or 40 feet of No. 7. The curve varied to the left and witness had no view of No. 7 around that curve, and before the collision of his engine with No. 7, *he heard no torpedoes go off* (Record, 46). At the time of the collision, witness thought No. 7 was standing still: "I would judge she was going 4 or 5 miles an hour" (Record, 46). That was not the usual speed of No. 7. At that time, his engine was running as nearly 25 miles an hour as he could figure it out. That before the collision, witness was looking

out the window of his engine all the way around. Witness was asked why he didn't stop when he saw the red lights on the rear end of No. 7, and he replied: "I stopped as quick as I could" (Record, 46). The track at the point of the collision was curved to the left—a heavy curve (Record, 46). *That witness did not hear the engineer of No. 7 sound a whistle signal for the flagman on No. 7 to go back and place torpedoes on the track* (Record, 46). The last car of No. 7 was a Pullman. That neither witness nor his fireman jumped from their engine before witness' engine struck the rear end of No. 7; witness remained right on the seat of his cab, and tried to get the reverse bar back, but didn't have time. When witness first saw No. 7, he thought it was standing still. The distance from the scene of the wreck to the nearest railway station, Fetterman, is 3 miles.

Witness was asked what was necessary to notify crews of extra trains of unexpected changes in the schedule running time of passenger trains, and he answered: They are supposed to give you an order the same as they give the leading trains, and that despatchers (Record, 46) *are supposed to give the following trains a copy of the order changing the schedule time of trains ahead; such train orders are given in different forms.* Most of the orders, at that time, were given on "19 order" which specifies the number of the train and the running—so much late or such a point, destination, and are delivered to the crews of the different trains through the telegraph operators. That witness did not receive any train order, telegraphic message, or any other instructions concerning the proposed change in the running time and the reduced speed of No. 7, and the probability of said passenger train stopping near the "Wickwire Bridge" in the early morning of April 10, 1910; *that witness could have avoided a collision with No. 7 on the occasion in question if witness had received the train order or telegraphic message from the telegraph operator or train despatcher of the B. & O. Railroad stating that No. 7 was to slow down or stop near the "Wickwire Bridge"; the said flagman was not on*

the rear end of the platform when witness first saw the train; that it was the custom, at that time, for engineers and conductors to go to the telegraph office and receive their orders, and they signed up for them (Record, 47).

Counsel for the defendant company waived cross-examination (Record, 47).

The only evidence introduced by the defendant in error were two documents, namely, the written application of the plaintiff in error to the Pullman Company for employment (Record, 35-36), and the contract between him and the Pullman Company (Record, 36-38), the sixth paragraph of which contains the alleged release (Record, 37). Plaintiff in error objected to the introduction of this contract "on the ground that it is in the teeth of the Employers' Liability Act of 1908, under which it is claimed that this suit is brought, and particularly section 5 of the said Act of Congress, which provides that any contract, rule or regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act shall to that extent be void. And further that there is no plea by the defendant in this case under which said alleged release could be offered, the court having previously by order in the case sustained the demurrer of the plaintiff to the plea offered by the defendant. And further, that the evidence is inadmissible, incompetent and irrelevant" (Record, 37-38). The trial judge overruled the objection, permitted the defendant railroad company to put the release in evidence, under the general issue plea, but refused to permit the railroad company to refile its plea of release, the trial judge stating: *"I do not think it would be fair to have that special plea refiled at this time,* after the demurrer has been sustained. * * *" (Record, 38-39). To the ruling of the court, exception was duly taken upon the grounds above set forth (Record, 39). The contract of employment is as follows:

"The Pullman Company, Washington Station.

"DISTRICT OF COLUMBIA, November 17, 1905.

"Contract of Employment.

"Be it known, That I, the undersigned, hereby accept employment by, and enter into, or continue from this date, in the service of, The Pullman Company upon the following express terms, conditions and agreements, which in consideration of such employment and the wages thereof I do hereby make with said The Pullman Company, to-wit:

"First. So long as I shall remain in said employment and service, I will fully comply with all regulations, rules and orders of said Company or its agents, issued for the government of its employees, go wherever I may be required in said service, and well, faithfully and honestly perform all duties assigned to me.

"Second. My wages shall at all times be calculated and paid at the monthly rate per day for the number of days I shall have been actually employed, and I may quit or resign, or may be suspended or discharged from such employment and service, at any time, or at any place, without previous notice.

"Third. If said Company shall suffer any loss or damage of any nature or character whatever resulting from the violation of any regulation, rule or order of said Company or its agents, or any fault, neglect, dishonesty or incompetency on my part, or in case any commissary supplies are placed in my custody and not returned or paid for by me in accordance with the rules of said Company, I will immediately upon notice thereof make with the proper officer of said Company a satisfactory settlement of such loss, damage, default or deficit, or failing so to do, the said Company is hereby expressly authorized, at any settlement made with me, to deduct from my wages the full amount of each and every such loss, damage, default or deficit, and to appropriate the same to its own use as liquidated damages. The value of commissary supplies shall be the prices shown on the

Luncheon Check at the time; and it is hereby expressly agreed that each and every such loss, damage, default or deficit shall be finally determined by the proper officer of said Company and adjusted as hereinbefore provided.

"Fourth. I assume all risks of accidents or casualties by railway travel or otherwise, incident to such employment and service, and hereby, for myself, my heirs, executors, administrators or legal representatives, forever release, acquit and discharge The Pullman Company, and its officers and employees, from any and all claims for liability of any nature or character whatsoever, on account of any personal injury or death to me in such employment or service.

"Fifth. I am aware that said The Pullman Company secures the operation of its cars upon lines of railroad, and hence my opportunity for employment, by means of contracts, wherein said The Pullman Company agrees to indemnify the corporations or persons owning or controlling such lines of railroad against liability on their part to the employees of said The Pullman Company in cases provided for in such contracts, and I do hereby ratify all such contracts made or to be made by said The Pullman Company and do agree to protect, indemnify and hold harmless said The Pullman Company with respect to any and all sums of money it may be compelled to pay, or liability it may be subject to, under any such contract, in consequence of any injury or death happening to me, and this agreement may be assigned to any such corporation or person and used in its defense.

"Sixth. I will obey all rules and regulations made or to be made for the government of their own employees by the corporations or persons over whose lines of railroad the cars of said The Pullman Company may be operated while I am traveling over said lines in the employment or service of said The Pullman Company; and I expressly declare that while so traveling I shall not have the rights of a passenger with respect to such corporations or persons, which rights I do expressly renounce; and I

hereby, for myself, my heirs, executors, administrators or legal representatives, forever release, acquit and discharge any and all such corporations and persons from all claims for liability of any nature or character whatsoever on account of any personal injury or death to me while in said employment or service.

"I have read and understand every word of this paper.

"GEORGE R. ROBINSON. [SEAL.]

"Signed, sealed and delivered in presence of
"C. L. MOFFETT,
"Chief Clerk."

(Record, 36, 37.)

Thereupon, counsel for the Railroad Company moved the trial court to instruct the jury to render a verdict in favor of the defendant company "on two grounds, first, that the Employers' Liability Act does not apply in this case—because the plaintiff is not an employé of the defendant company; and secondly, the failure of the plaintiff to prove negligence on the part of the railroad company, and it cannot be assumed that there was negligence" (Record, 48).

After the court announced what his ruling was and before the jury were actually instructed by the court to render their verdict in favor of the defendant, the plaintiff, by his counsel, requested the court to submit the case to the jury, subject to the opinion of the court on the law of the case, counsel for the plaintiff calling the attention of the court to the decision of the Court of Appeals of the District of Columbia, in the case of McNamara *v.* Washington Terminal Company (reported in 37 App. Cas. D. C., page 385, in which the appellate court held that the action of the trial court in an action for damages against a corporation for personal injuries, received through the negligence of a fellow servant, in directing a verdict for the defendant, on the ground that the defendant was not a common carrier within the meaning of the Employers' Liability Act of

Congress, instead of taking the verdict of the jury subject to the opinion of the court under common-law rule 52 of the trial court, is referred to with disapproval).

The trial court overruled the plaintiff's motion, to which exception was noted (Record, 48).

The court instructed the jury to find its verdict in favor of the defendant company, previous to which verdict by the jury, the plaintiff then and there noted his exception to said ruling, and the peremptory instruction of the court, upon the grounds, among others, that under the undisputed testimony in the case, the plaintiff was an employé of the defendant railroad company within the meaning and interpretation of said Employers' Liability Act of 1908, and also in view of the decision of Justice Anderson made in this case, the plaintiff was entitled to have his case submitted to the jury, the evidence showing that the defendant, by its agents, was negligent, and that said negligence caused the injuries complained of (Record, 48).

Motion for a new trial was filed, in which the plaintiff fully set forth his reasons therefor, among others, that the court erred in holding that the testimony in the case failed to show that the plaintiff was employed by the defendant, and he was entitled to have his case submitted to the jury under the Employers' Liability Act of April 22, 1908; that the court erred in admitting the alleged release in behalf of the defendant (Record, 23-24). This motion was overruled and judgment was entered for the defendant; an appeal was taken in open court to the Court of Appeals of the District of Columbia, and the same was perfected (Record, 24-25). An appeal was also noted in the clerk's office and citation was duly issued, the defendant accepting service thereof (Record, 25). An assignment of errors was duly filed for presentation to the Court of Appeals, in which the plaintiff renewed his several exceptions (Record, 49-50).

Decision of the Court of Appeals.

The court of appeals of the District of Columbia affirmed the judgment of the trial court (Record, 53-59), sustaining the contention of the defendant railroad company in its construction of the Employers' Liability Act of 1908, and the amendments thereto, urged by the defendant in the trial court and in the Court of Appeals. The court of appeals, in its opinion, decided that the plaintiff in this case was not an employé of the railroad company; that the railroad company simply hauled the car of the Pullman company; that the railroad company did not control said car or assume any responsibility for its management or equipment, and that the plaintiff was not entitled to maintain an action for injuries sustained by him, against the railroad company, under the provisions of the Employers' Liability Act of 1908, citing its previous opinion in the case of Hughson *vs.* Richmond & D. R. Co., 2 App. D. C., 98 (decided 1894), and that the contract of employment entered into between the Pullman Company and the plaintiff, exempting from liability any railway company over whose line the car in which plaintiff is employed is transported, is not in conflict with section 5 of the said Employers' Liability Act, and that said release is a complete bar (Record, 53-58). The decision is reported in 40 App. D. C., 169, 180.

The court of appeals denied the petition of plaintiff in error for a writ of error (Record, 63).

After the allowance of the writ of error by the Chief Justice of this court, plaintiff in error filed his assignments of error, the same being returned with said writ of error (Record, 60-63).

Specification of Errors.

The Court of Appeals of the District of Columbia erred:

1. In holding that the plaintiff in error, at the time of the injuries sustained by him, was not, either as a matter of law or fact, an employee of the defendant in error within the meaning of the Employers' Liability Act of 1908 (35 Stat. L., 65, c. 149, as amended by the act of April 5, 1910, 36 Stat. L., c. 143).

2. In not holding that the plaintiff in error was employed jointly and severally by the defendant in error and The Pullman Company within the meaning of said act.

3. In holding that no importance is to be attached to the fact that the plaintiff in error collected railroad transportation from passengers of the defendant in error.

4. In not holding that the trial court committed error in admitting the alleged release in evidence; and in holding that the alleged release was a complete bar to the right of the plaintiff in error to recover in this action.

5. In not holding that the order of the Supreme Court of the District of Columbia, before the trial, sustaining plaintiff's demurrer to the defendant's plea, setting forth the alleged release, constituted the law of the case.

6. In not holding that the plaintiff's evidence showed sufficient negligence upon the part of the defendant, or its agents, to be submitted to the jury.

7. In holding that the plaintiff in error was not entitled to have his case submitted to the jury under said Employers' Liability Act, upon the question of his employment and damages.

8. In its rulings in reference to the operation of the Pullman car, in holding as follows:

(*a*) That the Pullman car, annexed to and forming a part of defendant's interstate train, is a vehicle of a common carrier independent of the railroad company (Record, 56).

(*b*) That the porter performs no service connected with the operation of the train by the railroad (Record, 57).

(*c*) That "in fact, so far as the control of the car was concerned, it was as complete as if the entire train had been operated by The Pullman Company" (Record, 56).

(*d*) That "the mere fact that the Pullman Company employs the railroad company to haul its car does not affect its relation to the public" (Record, 57).

(*e*) That the service rendered by the porter forms no part of the contractual duty of the railroad company to its passengers (Record, 57).

(*f*) That passengers occupy berths under contract with The Pullman Company and not the railroad company (Record, 57).

9. In not holding that the trial court committed error of law in instructing the jury to render a verdict for the defendant railroad company.

10. In affirming the judgment of the Supreme Court of the District of Columbia.

ARGUMENT.

Errors 1, 2, 3, 7, 9, and 10.

Plaintiff an Employee Either as Matter of Law or Fact.

Assigned errors numbered 1, 2, 3, 7, 9, and 10, involve the questions whether, in view of the unchallenged testimony offered by the plaintiff in error, he was at the time of the injuries sustained by him an employee of the defendant in error, either as a matter of law or fact, or whether he was in the employ, jointly and severally, of the railroad company and The Pullman Company; also whether he was entitled to have his case submitted to the jury under the Employers' Liability Act of 1908.

Section 1 of the act provides:

> "That every common carrier by railroad while engaging in commerce * * * between the District of Columbia and any of the States * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * resulting in whole or in part from the negligence of any of the officers, agents, or employés of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, road-bed, works, boats, wharves, or other equipment."

In Pennsylvania Company *vs.* Roy, 102 United States, 451 (decided 1880), the facts were a passenger purchased from the railroad company a ticket over its line, and at the same time from a palace car company a ticket entitling him to a berth in one of its sleeping cars, constituting a part of the train of the railroad company. In the course of transportation he was injured by the falling of a berth in the sleeping car in which he was at the time riding. This court held

"that for the purposes of the contract with the railroad company for transportation, and in view of its obligation to use only cars that were adequate for safe conveyance, the palace car company, its conductor and porter, were, in law, the servants and employés of the railroad company, and that the negligence of either of them, as to any matters involving the safety or security of passengers was that of the railroad company."

On page 457, the court says:

"The law will conclusively presume that the conductor and porter assigned by the Pullman Palace Car Company to the control of the interior arrangements of the sleeping car in which Roy was riding when injured, exercised such control with the assent of the railroad company. * * * The law will not permit a railroad company, engaged in carrying persons for hire, through any device or arrangement with a sleeping car company *whose cars are used by the railroad company, and constitute a part of its train*, to evade the duty of providing proper means for the safe conveyance of those whom it has agreed to convey." (Italics ours.)

The following cases announce the same ruling:
Williams *vs.* Car Company, 40 La. Ann., 417.
Thorpe *vs.* Railroad Co., 76 N. Y., 402.
Dwinelle *vs.* Railroad, 120 N. Y., 117.
Louisville R. Co. *vs.* Katzenberger, 16 Lea, 380.
Railroad Co. *vs.* Lillie, 112 Tenn., 341.
Railroad *vs.* Ray, 101 Tenn., 10.

In *Baltimore & Ohio Southwestern Railway vs. Voigt*, 176 U. S., 498, 520 (decided 1900), Voigt brought suit to recover damages sustained by him in consequence of a collision between two trains of the plaintiff in error upon one of which, a passenger train, he was riding at the time of the accident. He was an express messenger riding in a car which was set apart for the use of the United States Express

Company, and occupied by that company for its purposes under a contract between the express company and the railway company. The plaintiff alleged that he was traveling as a *passenger for hire* on one of the defendant's trains, being an express messenger on said train. The railway company set up two grounds of defense. The first admitted that Voigt was an express messenger on its train, but denied that he was traveling as a passenger for hire. The second ground of defense alleged that under a contract entered into between it and the express company, it was agreed among other things, that the railway company would furnish for the express company, on the railway company's line between certain cities, cars adapted to the carriage of express matter, and that it was part of said contract that one or more employees of the express company should accompany said goods in said cars over the line of the railroad, and for such purpose should be transported in said cars free of charge, and that it was further provided in the contract that the express company should protect the railway company and hold it harmless from all liability the railway company might be under to employees of the express company for injury they might sustain while being transported by the railway company over its line for the purpose aforesaid, whether the injuries were caused by negligence of the railway company or its employees or otherwise; that prior to the accident, Voigt had made application to the express company in writing for employment as an express messenger, and that in pursuance to said application he was, prior to and at the time of the collision, employed by the express company under a contract in writing between him and it, by the terms whereof he assumed the risk of all accidents and injuries that he might sustain in the course of his said employment, whether occasioned by negligence and whether resulting in death or otherwise, and he agreed to indemnify and hold harmless the express company from all claims that might be made against it arising out of any claim or recovery on

his part for any damages sustained by him by reason of any injury, and did also agree to execute and deliver to the corporation operating the transportation line (in this instance the railway company), upon which he might be injured, a release of all claims and causes of action arising out of any such injury. The trial court sustained a demurrer interposed by Voigt to the second defense upon the ground that although Voigt was an express messenger riding upon an express car in the circumstances stated, he was a passenger for hire and entitled to the rights accorded by law to ordinary passengers traveling by a train of a common carrier, and further that it was not competent for the railway company to absolve itself from the duties which rest upon a common carrier in reference to its passengers.

This court held that Voigt was not a passenger; that he was not constrained to enter into a contract whereby the railroad company was exonerated from liability to him and that such a contract did not contravene public policy.

On page 511, after quoting from the opinion in the Express cases, 117 U. S., 1, this court says:

> "Our citations have been intended partly to disclose, in a succinct form, the nature of the express business, but more particularly to show that, in essence, the express business is one that requires the participation of both the companies on terms agreed upon in special contracts, thus creating to a certain extent, *a sort of partnership relation between them in carrying on a common carrier business.*" (Italics ours.)
>
> "We are not furnished in this record with an entire copy of the contract between the plaintiff in error, the Baltimore & Ohio Southwestern Railway Company, and the United States Express Company, but it is sufficiently disclosed in the statement made by the judges of the Circuit Court of Appeals, that the companies were doing an express business together as common carriers under an agreement entered into on March 1, 1895; that by said contract it was agreed that the railway company would fur-

nish on its line between Cincinnati and St. Louis, for the express company, cars adapted to the carriage of express matter over said line; that one or more employees of said express company should accompany said goods in said cars over the said line, and for such purpose should be transported in said cars free of charge; that the express company should protect the railway company and hold it harmless from all liability for injuries sustained by the employees of the express company while being transported for the said purpose over the railroad; that Voigt, the defendant in error, had agreed in writing to indemnify the express company against any liability it might incur by reason of said agreement between the companies, so far as he was concerned, and further agreed to release the railroad company from liability for injuries received by him while being transported in the express cars; that in consideration of such agreement on his part, Voigt was employed as an express messenger, and while so employed, and while occupying as such messenger a car assigned to the express company, received injuries occasioned by a collision, on December 30, 1895, between the train which was transporting the express car and another train belonging to the same railroad company.

"It is evident that by this agreement there was created a very different relation between Voigt and the railway company than the usual one between passengers and railroad companies." * * *

On page 513, the court continues:

"The relation between an express messenger to the transportation company, in cases like the present one, *seems to us to more nearly resemble that of an employee than that of a passenger.* His position is one created by an agreement between the express company and the railroad company, adjusting the terms of a joint business—the transportation and delivery of express matter. His duties of personal control and custody of the goods and packages, if not performed by an express messenger, would have to be performed by one in the immediate service of

> the railroad company. And, of course, if his position was that of a common employee of both companies, he could not recover for injuries caused, as would appear to have been the present case, by the negligence of fellow-servants." (Italics ours.)

In O'Brien *vs.* Chicago & N. W. Ry. Co., 116 Fed., 502 (Cir. Ct. U. S., N. D. Iowa), decided June 23, 1902, brought under the Employers' Liability Statute of Iowa, by the administratrix of an express messenger to recover damages against the railroad company, upon the ground that the messenger was an employee within the meaning of the Iowa Employers' Liability Act, the court, after quoting the language in the Voigt case, *supra*, says (page 508):

> "By the provisions of section 2071, the railway companies are declared to be liable to any person, including their employees, for injuries resulting from the neglect, mismanagement, or wilful wrongs of the servants or agents of the company connected with the operation of the railways. Is there any reason why express messengers are to be excepted out from the protection intended to be created by this section of the Code? The supreme court in the Voigt case, already cited, held that such messengers were not passengers upon the railway trains, but rather occupied the position of *employees of* both of the express and railway companies. If such is their legal position, then, being an employee of the railway company, the messenger clearly comes within the spirit as well as the language of section 2071, and the railway company is made liable to him for the consequences of the neglect or mismanagement of the employees of the company in the operations of the railway, and is certainly liable also for acts of negligence in the performance of the duties which the common law imposes upon the master, and which cannot be evaded by delegating the performance thereof to some one in his employ."

The demurrer of the plaintiff to the answer (setting forth the usual release given to the express company for the bene-

fit of the railroad company) was sustained. The express messenger was held to be an employee of the railroad company and entitled to recover under the Iowa Employers' Act.

On the trial of the O'Brien case, *supra*, the plaintiff recovered, and the railway company appealed. Chicago & N. W. Ry. Co. *vs.* O'Brien (C. C. A., 8th Cir., decided Sept. 5, 1905), 67 C. C. A., 421, 426 (also reported in 132 Fed., 593).

The court holds:

> "An express messenger while riding in a car furnished by a railroad company to the express company by which he is employed, under a contract by which the employees therein are carried free, occupies a relation to the railroad company analogous to that of one of its own employees, and the care which such company owes him in respect of its track, engines, cars, and the operation of its train is measured by that which it owes to those in its immediate service.
>
> "The statute of Iowa (Code, sec. 2071), providing that railroad companies shall be liable for all damages sustained by any person, including employees, in consequence of the negligence of other employees connected with the use and operation of their roads and that no contract which restricts such liability shall be legal or binding, does not alter the character of the relation between the railroad and a person injured, nor the rules of evidence appropriate to such relation upon an issue as to negligence.
>
> "In an action against a railroad company to recover for the injury or killing of an employee, or one occupying a like relation to the company, in a wreck caused by the derailment of a train, the fact of the accident is not evidence of negligence on the part of the defendant or its employees to sustain the burden of proof resting on the plaintiff."

The court, in its opinion, says (page 423):

> "The deceased did not, while upon the train in the performance of his duties as an express messenger, sustain to the railroad company the relation of a

passenger, and he was not, therefore, entitled to that highest possible degree of care to which a common carrier is held for the safety of those who have paid for their transportation as passengers. Neither was the express messenger a mere licensee. He was not upon the train at the mere sufferance of the railway company, but he was engaged thereon in the performance of duties which had connection with its business of transportation, and which would naturally have been performed by its own employees had it not been otherwise arranged by contract with the express company. His relation to the railway company was analogous to that of one of its own employees. Railway Co. *vs.* Voigt, 176 U. S., 498; 20 Sup. Ct., 385; 44 Law Ed., 560. The measure of care which the railway company owed him in respect of its track, engine, cars and the operation of its train was the same which it owed to those in its immediate service.

"The derailment of the train, the injury to the express messenger, and his death occurred in the State of Iowa. The contracts between the express company and the deceased and between the express company and the railway company, in so far as they provided for the immunity of the latter from all liability to him for the result of its negligence, are contrary to the public policy of that State as expressed in the act of its legislature. But this statute while avoiding those provisions of the contracts, did not alter the character of the relation between the railway company and the deceased nor the rules of evidence appropriate thereto." * * *

"The burden of proof is upon him who asserts that the employer was negligent" (page 424).

The trial court charged that the doctrine of *res ipsa loquitur* was applicable, and for this error alone the judgment was reversed.

Upon a retrial of the case, the plaintiff obtained a verdict against the railroad company. It was again appealed by the railroad company. See Chicago & N. W. Ry. Co. against O'Brien (C. C. A., 8th Circuit, March 30, 1907), 153 Fed. Rep., 511, also reported in 82 C. C. A., 461, 464). In error to

the Circuit Court of the U. S. for the Northern District of Iowa.

The court says (page 461):

> "This is the second appearance of this case in this court. When it was first here, a judgment in favor of the plaintiff was reversed because the trial court refused to instruct the jury that negligence could not be inferred from the fact of accident in an action for the death of one who was not a passenger, but whose relation to the defendant was analogous to that of an employee and governed by the same principles. Also it was doubted that there was sufficient evidence that the derailment of the train which resulted in the death of the deceased was due to the negligence of the defendant."

Additional evidence, showing the improper rate of the speed of the train, was offered, and the jury found for the plaintiff, and the judgment was affirmed.

The joint business relations between The Pullman Company and the Baltimore & Ohio Railroad Company, as disclosed by the written contract offered in evidence in this case, are closer than the relations existing between the express company and the railroad company shown to exist in the Voigt case. If, as the court holds in the Voigt case, the relationship between the two companies was "a sort of partnership relation between them in carrying on a common-carrier business," and that the position of the "express messenger to the transportation company seems to us to more nearly resemble that of an employee than that of a passenger," then what shall be said of the relationship of the two companies in this case, and the contract between the plaintiff and The Pullman Company, in which he specifically ratifies the contract between the two companies?

Section 3 of the contract between the two companies (Record, 27) provides that The Pullman Company shall have the right to collect from the occupants of Pullman cars for the use of seats and berths therein, the fares, and that The

Pullman Company shall provide the necessary employees, *who shall be subject to the rules of the railroad company governing its (railroad) own employees.*

Section 4 provides that the railroad company shall pay to The Pullman Company the cost of repairing and making good all damages to any of the Pullman cars resulting from accident or casualty or fire, etc., with certain exceptions.

Section 9 provides:

> "If any of The Pullman Company's employees furnished with any of its sleeping or parlor cars operated under this agreement shall be injured or killed in consequence of a railroad accident or casualty when serving in the line of his duties, the railroad company shall save harmless The Pullman Company from damages, cost and expenses growing out of or incident to such injuiry or death, to the extent that the railroad company would be liable if such employee were in fact an employee of the railroad company when so injured or killed, and The Pullman Company shall save harmless the railroad company from such damages, costs and expenses to any greater extent, each party to have immediate notice from the other of any claim or suit for any injury or death and the right to resist or defend such claim or suit."

The last paragraph of section 12 provides that the railroad company shall not make a charge against The Pullman Company for the movement of Pullman cars, and The Pullman Company agrees not to make a charge against the railroad company for the use of Pullman cars.

Section 13 makes provision for the distribution of the earnings between the two corporations to be derived from the sale of seats and berths in the Pullman cars furnished under the agreement.

By the fifth clause of his contract with The Pullman Company, the plaintiff in error ratifies the contract between The Pullman Company and all railroad companies that haul Pullman cars; and he agrees to protect, indemnify, and hold

harmless The Pullman Company with respect to all sums of money it may be compelled to pay, or be subject to, *under any such contracts* in consequence of any injury or death happening to him.

By the sixth clause the plaintiff in error agreed to obey all rules and regulations made or to be made for the government of their own employees by the corporations over whose lines of railroad the cars of The Pullman Company may be operated while he travels over said lines in the employment of, or service of, The Pullman Company; and he then provides for a full release to any and all corporations hauling Pullman cars.

Plaintiff an Employee of Both Companies.

We submit that the plaintiff in error was an employee of both corporations:

Because the contract between the two companies creates a partnership. Baltimore & Ohio Southwestern Railway Company, *supra;* Oliver *vs.* Northern Pacific Railway Co., 196 Fed. Rep., 432; Ward *vs.* Thompson, 22 Howard, 330, in which this court held that where the parties have joined together to carry on a certain adventure or trade for their mutual profit—one contributing the vessel, the other his skill, labor and experience, etc.—and there is a communion of profits on a fixed ratio, it is a partnership.

Where there is any partnership arrangements between two masters (*e. g.*, two railroad companies), wherein a servant is employed for the common business of both, the servants of either master will become fellow-servants. McKinney on Fellow Servants, p. 46; Railroad *vs.* Schneider, 45 Ohio St., 678; Swainson *vs.* Railroad, L. R., 3 Exch. Div., 341.

Employment and payment of a person are not indispensable elements to create the relation of master and servant (D. & R. G. R. R. Co. *vs.* Gustafson, 21 Colorado, 393; Gaines *vs.* Bard, 57 Ark., 615).

In the case of Oliver *vs.* Northern Pac. Ry. Co. (District Court, E. D. Wash., N. D., decided February 5, 1912), reported in 196 Federal Reporter, 432, decedent was a porter on a Pullman car owned jointly by defendant railroad company and The Pullman Company and operated by them as an Association under a contract providing that The Pullman Company should have the management thereof, but that all obligations with reference to operation of the cars should be borne by the Association, which should furnish each car one or more employees, who at all times should be subject to the rules of the railroad company governing its own employees; that the earnings should be divided in certain proportions, and, in the event of liability arising against the railroad company for personal injuries to an employee of the Association, the railroad company should be liable only to the same extent it would be if the person injured were an employee in fact of the railroad company, and for all excess liability the railway company should be indemnified and paid by the owners of the car. *Held, that decedent was an employee of the railway company within Federal Employers' Liability Act, April* 22, 1908, *c.* 149; 35 *Stat.*, 65 (*U. S. Comp. St. Supp.* 1911, *p.* 1323), *and hence thereunder his personal representatives were not precluded from recovering for his death resulting from the negligence of the railway company by a provision in his contract of employment purporting to release both The Pullman Company and the railway company from such liability.*

In the opinion in the Oliver case it does not appear that plaintiff's intestate collected railroad transportation. The contract of employment entered into between the deceased porter and The Pullman Company contained a provision identical in language with the sixth paragraph of the contract of employment between the plaintiff in error, Robinson, and The Pullman Company.

It appears in the Oliver case the railroad company and The Pullman Company were the joint owners of fifty sleep-

ing or Pullman cars on January 1, 1897, and on that day the two companies entered into a contract, which was in force at the time of the accident, whereby it was agreed, among other things, that:

> " 'The cars owned jointly by the railway company and The Pullman Company shall be known as Association cars; The Pullman Company having the management thereof; and all obligations of The Pullman Company with respect to the operation of said cars shall be assumed and borne by the Association. * * * The Association shall furnish with each of such sleeping cars, one or more employees, as may be required, whose duties shall be to collect fares from passengers occupying such cars, for the use of seats or berths, and generally to wait upon and provide for the comfort of passengers therein; such employees at all times to be subject to the rules of the railroad company governing its own employees. The Association shall also furnish employees who shall have charge of all the sleeping cars used under this contract.'
>
> "It was further agreed that from the gross earnings of the Association cars certain operating expenses should be deducted; that, after deducting such operating expenses, the balance should be divided between the railway company and The Pullman Company in the proportion of their respective interests in the Association cars; and that whenever the revenue from sales of seats and berths exceed an average of $6,000 per annum, upon the whole number of Association cars, the Association should pay the railway company the amount in excess of $6,000 per annum per car."

The court says:

> "It will thus be seen that the railway company was the owner of a half interest in the Pullman car upon which the deceased porter was employed, and that the deceased was employed by an Association of which the railway company was a part. True, The Pullman Company was the manager for the

Association, but in that respect it was simply an agent for the railway company, Stripped of matters of mere form, the railway company and The Pullman Company operated this car jointly for their joint benefit, and employed the porter jointly. This view of the contract was recognized by the two companies, for at another place in the contract it is expressly provided that:

" 'In the event of any liability arising against the railway company for personal injury to any employee of the Association or The Pullman Company, it is hereby agreed that the railway company shall be liable only to the same extent it would be if the person injured were an employee in fact of the railway company, and for all liability in excess thereof shall be indemnified and paid by the owners of the car.'

"The porter was undoubtedly an employee of the Association within the meaning of this provision. The question then arises, Is a person employed jointly by a railway company and another company in the operation and management of a train an employee of the railroad company, within the meaning of the Employers' Liability Act? In my opinion this question must be answered in the affirmative. The contract between these two companies was entered into long prior to the passage of the act in question, and was therefore not entered into for the purpose of circumventing or avoiding liabilities imposed by law. Nevertheless, if such a contract is recognized and given the effect claimed for it by the defendant, there is nothing to prevent railway companies from avoiding obligations imposed upon them by this or other laws of Congress. It was attempted in argument to draw a distinction between those positive obligations imposed upon public-service corporations by law and obligations voluntarily assumed by them for the comfort and convenience of passengers, and for their own profit. Such a distinction may, and in some cases does, exist, but it cannot be gainsaid that persons employed by railway companies in performing obligations voluntarily assumed are as much employees of the company as those servants who are discharging positive duties imposed by law. Persons

employed as the deceased was come within the spirit of the statute, and those dependent on them for support should not be denied the protection it affords."

The court of appeals held that the Oliver case was inapplicable because it appeared that the railroad company was part owner of the Pullman car upon which Oliver was working. We submit that the mere fact that the railroad company possessed an undivided one-half interest in the Pullman car is not the test as to whether the case comes within the meaning of the Employers' Act. If it were so, it would be an easy matter for a common carrier by railroad engaged in interstate commerce to evade the act by the simple method of operating cars owned by another. We contend that the use, control, and operation of a Pullman car by the railroad company in interstate commerce, jointly with the owner of the car, for the mutual financial benefit and advantage of both companies, in virtue of the contract in this case, brings the operation of the car and the persons performing services in the car, within the meaning of the Employers' Act.

Plaintiff in Error Became Pro Hac Vice Employee of Railroad Company.

In the contract between the two corporations, it is provided that The Pullman Company should furnish the necessary employees, who shall be subject to the rules of the railroad company governing its own employees; and in the contract between the plaintiff in error and The Pullman Company the plaintiff in error bound himself to obey all rules and regulations made or to be made by the railroad company governing its own employees. When the railroad accepted the plaintiff in error in a Pullman car, conveyed as a part of its train, The Pullman Company furnishing the porter as one of the necessary employees pursuant to the contract between the two companies, and the railroad company ac-

cepted his services, the plaintiff in error became *pro hac vice* the employee of the railroad company.

The general servant of one person may, for a time or on a particular occasion, become the servant of another by submitting himself, either expressly or impliedly, to the control and direction of the other.

Standard Oil Co. *vs.* Anderson, 212 U. S., 215.
Brooks *vs.* Central Sainte Jeanne, 228 U. S., 688.
Morgan vs. Smith, 159 Mass., 571.
Hasty *vs.* Sears, 157 Mass., 123.
Johnson *vs.* Lindsay, L. R. App. Cas. (1891), 371.
Rourke *vs.* Colliery Co., L. R., 2 C. P. Div., 205.
McDowell *vs.* Co., 28 N. Y. Supp., 821.
Wyllie *vs.* Palmer, 137 New York, 248.
Kimball *vs.* Cushman, 103 Mass., 194.
Brown *vs.* Smith, 86 Ga., 274.
Clapp *vs.* Kemp, 102 Mass., 481.
Murray *vs.* Currie, L. R., 6 C. P. Div., 24.
Railroad Co. *vs.* Jones, 12 S. W. Rep. (Tex.), 972.
Railroad *vs.* Schneider, 45 Ohio St., 678.
Westover *vs.* Hoover (Neb.), 129 N. W., 285.

In Standard Oil Co. *vs.* Anderson, *supra,* this court discussed the general subject of when the relation of master and servant does and does not exist. On page 221 (212 U. S.), the court says:

> "It sometimes happens that one wishes a certain work to be done for his benefit and neither has persons in his employ who can do it, nor is willing to take such persons into his general service. He may then enter into an agreement with another. If that other furnishes him with men to do the work and places them under his exclusive control in the performance of it, those men become *pro hac vice* the servants of him to whom they are furnished."

In Thomp. on Neg. (2d ed.), sec. 3742, it is said:

> "An express contract is not necessary to create the relation of master and servant. The relation exists if the plaintiff, with the knowledge, consent, and approval of the defendant, acts as baggageman, and in that capacity *performs duties which the defendant owes to the public.*"

Mr. Thompson cites the case of Missouri, K. & T. Ry. Co., of Texas *vs.* Reasor, 28 Tex. Civ. App., 302. The opinion fully sustains the text, the court saying:

> "The court instructed the jury that the evidence was not sufficient to warrant the conclusion that there was such express contractual relation between the plaintiff and the defendant as to constitute the relation of master and servant, and appellant contends that, such being the case, a peremptory instruction to find for the defendant should have been given. The contention cannot be sustained. An express contract was not necessary to create the relation of master and servant.
>
> *"The relation existed if the plaintiff, with the knowledge, consent, and approval of the defendant, acted as baggageman, and in that capacity performed duties which it owed to the public. In such case, he would be as much the servant of the company as if he had been working under an express contract of employment."*

In the case of Vary *vs.* The B. C. R. & M. R. Co., 42 Iowa, 246, 249, plaintiff was in the employ of the *Chicago & Northwestern Ry. Co.*, as switchman. It was his duty as such to switch and couple and uncouple cars belonging to both companies. Plaintiff received his pay from the *Chicago & Northwestern*. The B. C. R. & M. R. Co., paid the *Chicago & Northwestern* its share of the operating expenses. The court says (page 249):

> "These facts are sufficient to create the relation of master and servant, and the fact that plaintiff was

in the general employment of another company does not change the matter, since a person may be the general servant of one and the special servant of another; that is, he may perform special services for one while he is the general servant of another, and while performing such special service he will be the servant of the one for whom such services are performed, as to that particular service. See Laugher *vs.* Pointer, 5 B. & C., 579.

"We are of opinion that the petition shows plaintiff to have been in the performance of service for the defendant at the time he was injured, by virtue of a contract between them that plaintiff should do so. This makes the plaintiff defendant's servant in that transaction. If, however, the averments of the petition be understood as showing that plaintiff was the joint servant of the two railroad companies (and we think it cannot be construed to do less than this), still plaintiff has his election to sue one or both of them. This principle is elementary, and needs no citation of cases in its support."

In the case of Hannegan *vs.* Union Warehouse Co., 38 N. Y. Supp., 272-3, it was held that "Where two principals unite in the performance of work for their mutual advantage, each owes to the servants of the other engaged in the work the same duty to furnish safe implements as to those employed by him directly." This is an indirect holding that the servant of one is the servant of the other employer; and in the case just cited plaintiff was allowed to recover damages not of his immediate employers but of the other company.

In the case of Mound City Pain, etc., Co. *vs.* Conlon (Mo.), 92 Mo., 221, the court says (229):

"In Wood on Master and Servant, sec. 306, it is said: 'The relation of master and servant only exists where the party sought to be charged as master either employed or *controlled* the servant, *or had the right of control over him at the time when the injury happened, or expressly, or tacitly assented to the rendition of the particular service by him.* He must, at the time, have had the right to direct the action of

> the servant, and to accept or reject its rendition by him.' To the same effect is Cooley on Torts, 533. There can be no doubt, from the evidence of Conlon himself, that Archibald was under his control, and that of his foreman during the time the digging was done on the day the wall fell, and while they were waiting for the shores."

On March 23, 1888, the legislature of Ohio passed an act providing "that every railroad corporation operating a railroad, or part of a railroad, in this State, shall, before the first day of October, in the year 1888, adjust, fill, or block the frogs, switches, and guard-rails on its tracks, with the exception of guard-rails on bridges, so as to prevent the feet of *its* employees from being caught therein" with a penalty in the act for every violation thereof.

In the case of Atkyn *vs.* Wabash Ry. Co., 41 Fed., 193, Hammond, J., in instructing the jury, construed this act as follows (page 197):

> "You will observe that this statute is entitled 'for the protection of railroad employés.' Its language is that it is to prevent the feet of *its* employés from being caught therein. Now, John Ward was an employé of the *Lake Shore Company*. The proof is that at this particular point where he lost his life there was a delivery track, at which the *Wabash Company* received from the *Lake Shore Company* cars to be delivered and transported by the *Wabash Company*, and, *in order that each of these companies might, in a business-like manner, transact that business of transferring these cars, each of them had a young man, whose duty it was, in the making up of these trains at that place, to go to the cars as they were delivered in that neighborhood, where this guard-rail was, and to take down the numbers of the cars, inspect their seals, examine the condition of the car itself and make a report respectively to his employer as to these facts.* It is obvious to you, gentlemen, that these young men were engaged in a necessary duty to each of these railroad companies; that that duty was mu-

tual and joint, as between each other. Good business conduct required that these railroads should transact it in some way that would keep up with the delivery of the cars, so that each company would have a check upon the other, as to the condition of the cars and seals. That was a joint, mutual, and necessary process to each of them. *It is my opinion, and the court so charges, that the word 'employé' used in this statute does not mean simply those men on the pay-rolls of the Wabash Company, who were in one sense its only employés, but it means all employés and servants authoritatively engaged in and about the tracks, and guard-rails, and frogs of the Wabash Company. It protects all railroad employés whose duty it was to the Wabash Company, or any other company permitted to use that track, to move in, and about, and over these guard-rails and frogs, in the transaction of this delivery business of the Wabash Company. It would be an unreasonable construction of this act to hold it was made to protect only such men as were the employés of the Wabash Company, in the sense that they received their employment from that company, and received their pay from it, and were on its pay-rolls. The legislature of Ohio never meant such a thing as that. It meant all those who by rightful authority of the Wabash Company were engaged in and about the business of walking over these frogs and guard-rails. I charge you that, under a reasonable construction of this act, John Ward was within the protection of this act, and in the protection owed by the Wabash Company to that class of railroad employés."*

The motion of the defendant in error was equivalent to a demurrer to the plaintiff's case, and the defendant thereby admitted the truth of all of the evidence of the plaintiff and all legal deductions that arose therefrom. This admission included, of course, the testimony of the plaintiff that on every trip he made he collected railroad transportation from the passengers of the defendant, riding in the Pullman car, kept the same in a B. & O. envelope given to him for that purpose, and made a daily accounting to defendant's train

conductor; that it was a part of his duty to collect railroad transportation, for which he received an additional salary of $15 a month; that he waited upon defendant's passengers and provided for their comfort.

If it be held that the uncontradicted evidence submitted by the plaintiff did not show him to have been an employé of the defendant, or the employé of defendant and The Pullman Company, as a matter of law, then we contend that the evidence was sufficient to be submitted to the jury. Northwestern Union Packet Co. *vs.* McCue, 17 Wallace, 508; Missouri, Kansas & Texas Ry. Co. *vs.* West, 232 U. S., 682; Tennessee Coal, Iron & R. R. Co. *vs.* Hayes, 97 Ala., 201; Dwinelle *vs.* N. Y. C. & H. R. R. Co., 120 N. Y., 118; Sacker *vs.* Waddell, 98 Maryland, 50.

The court of appeals, in its opinion (Record, 58), says:

> "This brings us to the contract of employment. It is not in conflict with section 5 of the [Employers'] act of 1908, which provides: 'That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void.' This provision must be construed in connection with the act which relates to railroad employees engaged in interstate commerce. Plaintiff, not occupying that relation to defendant, cannot avail himself of it to defeat his contract of employment. Stripped, therefore, of all connection with the act of 1908, the contract of employment furnishes a complete bar to plaintiff's right to recover in this action. Voigt *vs.* B. & O. R. Co., *supra.*
>
> "There is no importance to be attached to the mere fact that after the execution of the contract of employment plaintiff's salary was increased, and he was assigned the additional duty of *occasionally* collecting railroad tickets. This did not relieve him from the obligations of his contract. It did not affect his waiver of right to maintain this action against defendant company. He was originally employed as a Pullman porter, and at the time of the alleged accident still retained that position." (Italics ours.)

The written contract between the plaintiff in error and The Pullman Company is dated November 17, 1905. (Record, 36.) The uncontradicted testimony showed that between 1905 and 1908, plaintiff was an "extra" Pullman porter with "a run all over the country" (Record, 34); and that during said period his duties were those of an "ordinary porter" in Pullman coaches, annexed to railroad passenger cars, namely, the attention by plaintiff to the needs and accommodation of railroad passengers, who occupied berths and seats in Pullman coaches; that his salary was $25 per month and "tips" from passengers (Record, 32, 34); that in November, 1908, he was promoted to the position of a "porter in charge," with increased compensation, to wit: $40 per month (and tips) with a regular run on a Pullman coach, annexed to a Baltimore & Ohio Railroad passenger train, No. 7, between Washington and Wheeling (Record 26, 32, 34), with the additional duty assigned him, namely, *the collection from passengers of the Baltimore & Ohio Railroad Company of Pullman fares and Baltimore & Ohio Railroad transportation* (Record, 26, 30, 32, 33, 34, 39, 40).

In its opinion, the court of appeals says that "he was assigned the additional duty of *occasionally* collecting railroad tickets," and that no importance is to be attached to that fact.

The uncontradicted evidence is that the collection by the plaintiff of railroad transportation was *a daily occurrence*, and he made his accounting to the passenger conductor of the railroad company (Record, 30, 33, 34, 39, 40, 41).

The plaintiff in error was not a volunteer in the collection of railroad transportation from its passengers. (Brooks *vs.* Central Sainte Jeanne, 228 U. S. 688). In Pullman Palace Car Co. *vs.* Lee, 49 Ill. App., 77, the court says:

> "The sleeping car and the conductor and porter in charge of it are under the control of the railroad conductor, whose authority is complete."

Errors 4, 5.

Alleged Release No Bar.

The alleged release may be viewed from several aspects. If the plaintiff was an employee, as a matter of law, then his case comes within the employers' act, and under section 5 of the act it is inadmissible and incompetent. If, however, the question of plaintiff's employment should have been submitted to the jury, and the verdict had been that he was an employee, then the alleged release would not bar the action. If the jury had found that plaintiff was not an employee, then that finding alone would have defeated plaintiff's right to recover under the act.

The first plea filed by the defendant was the general issue. Thereafter, upon leave of court, defendant filed an elaborate special plea, setting forth the alleged release, to which plaintiff demurred upon the ground that said plea showed upon its face that plaintiff was an employee, and that it was incompetent in view of section 5 of the act. The demurrer was sustained, the court, per Mr. Justice Anderson, in his written opinion (Record, 11-18) setting forth (commencing Record, 14):

> "As this question is now presented upon demurrer by the plaintiff to the defendant's special plea, all of the facts contained in said plea which are well pleaded must be taken as true for the purposes of the demurrer, and the court must determine whether such facts do or do not show the plaintiff to have been employed by the defendant within the meaning of the act under consideration. What was the relation of the plaintiff to both the defendant railroad company and The Pullman Company? According to the averments of this special plea, it was that of an employee or servant of The Pullman Company upon a car owned by said company, but at the time constituting a part of the defendant railroad company's train, the plaintiff being expressly obligated in his

contract with said The Pullman Company to 'obey all rules and regulations made or to be made' by the defendant railroad company for the government of the latter's 'own employees,' and the said The Pullman Company being obligated under its contract with the defendant railroad company to furnish employees upon said car to 'collect fares for said The Pullman Company, from * * * railroad passengers occupying said car * * * and generally to wait upon and provide for the comfort of passengers therein,' which latter constituted the duties of the plaintiff at the time of the accident as a porter so furnished by said The Pullman Company. These are the facts from which the court must determine whether the plaintiff was, at the time of the accident, employed by the defendant within the meaning of the said Employers' Liability Act. In the opinion of the court, the averment in said special plea that the plaintiff was upon the defendant's railroad at the time, 'exclusively upon business of the said The Pullman Company,' is a statement of a conclusion merely, and is dependent upon, and subject to, the specific averments of fact contained in the plea as to the relation of the plaintiff to the respective companies.

"Did the relation of master and servant exist between the defendant railroad company and the plaintiff Pullman porter by reason of these facts?"

Justice Anderson then quotes from the case of Standard Oil Company *vs.* Anderson, 212 U. S., 221, and continues (p. 15):

"So that, in determining whether a particular person or corporation is liable as master for the negligence of another causing injury to a stranger, the inquiry is: Who had the authoritative direction and control of the alleged servant?

"But when the injury is not to a stranger, but to someone to whom there is a special liability, as in the cases of carrier and passenger, the rule as to who are servants or employees for whose negligence the master or carrier is liable is very much broader. The Supreme Court of the United States held in Penna.

R. R. Co. *vs.* Roy, 102 U. S., 451, that as between carrier and passenger, in a suit by the latter against the former for injuries sustained in consequence of the falling of a berth in a car of the train, the carrier was liable, notwithstanding the particular car was in fact owned by another company (in that case the Pullman Palace Car Company), and that said company provided at its own expense a conductor and porter for such car, to whom was committed the immediate control of its interior arrangements. The Supreme Court said:

"'For the purpose of the contract under which the railroad company undertook to carry Roy (its passenger) over its line and, in view of its obligation to use only cars that were adequate for safe conveyance, the sleeping-car company, its conductor and porter, were, in law, the servants and employees of the railroad company.'

"In the case at bar, however, the injury complained of was neither to a stranger, nor to a passenger. What was the status of the plaintiff at the time of his injury?"

The court then quotes from the opinion in the Voigt case (176 U. S., 513) and O'Brien *vs.* Chicago, etc., Ry. (116 Fed., 502)—express messenger cases. Referring to the opinion of Mr. Justice Shiras in the O'Brien case, the court says:

"and he held, following the principles laid down in the Voigt case, in the light of the new provisions of law engrafted by said Employers' Liability Act of Iowa, that the defendant railroad company could not escape liability either because of the fact that the plaintiff was a fellow-servant, or because the plaintiff had executed a contract of release, since the act expressly abolished both kinds of defenses, and the plaintiff was a person of the class entitled to the benefits of the act.

"So, in the case at bar, in the judgment of the court, the defendant railroad company cannot escape liability either because of the fact that the plaintiff was a fellow-servant, or because he had executed a

contract of release, since the act here under consideration expressly abolished both kinds of defenses, and the plaintiff belongs to the class of persons entitled to the benefits of the act within its true intent and meaning, as the court interprets the act. If, as was said by the Supreme Court in the Voigt case, an express messenger is an employee of a railroad company in consequence of the joint business conducted by the railroad company and the express company, the same must certainly be true of a Pullman porter in consequence of the joint business conducted by the defendant railroad company and The Pullman Company.

"Not only so, but every passenger on the defendant's train was a passenger of the defendant, whether riding in its own cars or in the cars of The Pullman Company. For those preferring to ride in the cars of the Pullman Company, that company was bound, under its contract with the defendant company, to furnish the necessary cars for the purpose, to be hauled as a part of the defendant's train, and likewise the necessary number of porters 'to wait upon and provide for the comfort' of the defendant's passengers riding in said Pullman cars. Moreover, as appears from the special plea of the defendant now under consideration, the plaintiff was bound, by the terms of his contract of employment with the Pullman Company of November 17, 1905, to—

" 'obey all rules and regulations made or to be made for the government of their own employees by the corporations or persons over whose lines of railroad the cars of said The Pullman Company may be operated.'

"The court is of opinion that the language used by Congress in the act under consideration, namely, *'Any person* suffering injury *while he is employed,'* was not used in any narrow sense, but that it was intended to cover every employee within the broad interpretation put upon that term by the Supreme Court in the Voigt case. Any other construction would subject the plaintiff and all other servants and employees similarly situated to the same hazards and

dangers of interstate commerce as are other employees and servants of the carrier, without affording them the same protection against the negligence of their fellow-employees. Evidently it was the purpose of Congress to thus provide against any attempted evasion of liability under the act by the carrier, through any existing or subsequent contract, rule, regulation or device that might be invoked for that purpose. The statute, in effect, declares or establishes a rule of public policy in respect to interstate transportation by common carriers by railroad, and hence no pre-existing contractual obligation or device, as well as none subsequent to the passage of the act, can be invoked to defeat this absolute right of the person so injured to maintain a civil suit for damages against such carrier.

"Manifestly, it is the plain purpose of the act to place all persons so employed under its protection, and to deny to the carrier the exemption from liability that would otherwise remain to him under pre-existing contracts of this character as well as to deprive such carrier of its pre-existing common-law right to interpose the fellow-servant doctrine as a defense. This, as it seems to the court, is in harmony with the chief purpose of the act itself, and is indeed an essential condition to carrying out its salutary purpose, viz., the promotion of the safety and efficiency of interstate commerce that must naturally result from this added responsibility of the carrier toward its servants and employees, and the increased protection of the latter in carrying on such commerce. This certainty of liability and consequent certainty of protection are the means employed to effect this salutary purpose.

"So that while at common law this contract of release would be valid, it is not so, in the opinion of the court, under the Employers' Act of April 22, 1908, now under consideration."

After the demurrer was sustained the defendant obtained leave to amend, but never availed itself of that privilege.

The plaintiff was thereby led to believe that the order

and ruling of Justice Anderson constituted the law of the case. At the trial, however, the trial judge (Mr. Justice Gould) disregarded the order of Mr. Justice Anderson, speaking for the same court, and permitted the defendant to introduce the alleged release under the general issue, over the exception of the plaintiff. The trial court refused to grant the defendant's motion for leave to refile the plea, ruling as follows:

> *"I do not think it would be fair to have that special plea refiled at this time, after the demurrer has been sustained. But I will let you plead* [it] *under the general issue and you can save that point* (Record, 38-39)."

In other words, the special plea was not allowed to be physically refiled, yet the learned trial judge permitted the defendant, over plaintiff's objection and exception (Record, 39), to put in evidence the subject-matter contained in the plea, which included the alleged release, and he then ruled that in consequence thereof the plaintiff could not recover.

Section 1533 of the D. C. Code applies only where the demurrer has been overruled; it has no bearing upon a case where the demurrer has been sustained (Nalle *vs.* Oyster, 230 U. S., 165).

In Clearwater *vs.* Meredith, 1 Wallace, 43, the court says:

> " 'On demurrer to any of the pleadings which go to the action, the judgment for either party is the same as it would have been on an issue in fact, joined upon the same pleading and found in favor of the same party" (Gould's Pleadings, ch. IX, § 42). And when the defendants' plea goes to bar the action, if the plaintiff demur to it and the demurrer is determined in favor of the plea, judgment of *nil capiat* should be entered, notwithstanding there may be also one or more issues in fact; because, upon the whole, it appears that the plaintiff had no cause of action (Tidd's Practice, 4th American edition, 741-2)."

The special plea of the defendant setting forth matter which, if admissible, constituted a complete avoidance of plaintiff's action, having been demurred to and the demurrer sustained, the defendant acquiescing in the action of the court, the decision of the court was binding upon the defendant and constituted the law of the case (United States *vs.* Ballard, 14 Wallace, 457).

Error 6.

Negligence of Defendant.

One of the grounds urged by counsel for the defendant railroad company in support of the motion to instruct the jury to render a verdict for the defendant company was that the plaintiff failed to prove negligence on the part of the railroad company, and that it cannot be assumed that there was negligence. The trial court ruled that the plaintiff was not an employee of the railroad company, but expressed no opinion as to the uncontradicted testimony offered by the plaintiff relating to the defendant's negligence.

The court of appeals, in its opinion, makes no reference to the testimony adduced by the plaintiff upon the subject of the defendant's negligence.

The plaintiff, asserting that he was an employee of the railroad company as well as of The Pullman Company, conceded that it was incumbent upon him to show that his injuries were sustained by the negligence of the defendant, or its agents, and the testimony offered by him upon this subject was, we contend, amply sufficient to be submitted to a jury.

Defendant's passenger train No. 7, upon which the plaintiff was performing his duties, was due to arrive at Grafton, West Virginia, at 1:47 a. m. (April 10); being 13 minutes late, it arrived there at 2 a. m., when the conductor, engineer, and flagman of No. 7 got off the train, as usual, and went to the telegraph office to receive their train orders. They

then returned to the train. No passengers got on at Grafton; train stopped at Grafton about four or five minutes, leaving about 2:04 or 2:05 a. m., and then proceeded westwardly toward Fairmont.

When No. 7 left Grafton, the engineer, conductor, and flagman knew that defendant's extra No. 330 had struck a cow between Fetterman and Valley Falls, because the defendant's train sheet shows that No. 7 was looking out for a cow, which had been struck by extra 330, when the defendant's extra 2610 ran into No. 7 (Record, 43). No. 7 commenced to "slow down" after it had gone about a mile or a mile and a half out of Grafton, during which "slowing down" the collision occurred. The collision occurred about 2¼ miles from Grafton, and about three-fourths of a mile from Fetterman (Record, 32). There are stations between Grafton and Fairmont, but the train never stopped between those points (Record, 31). The "Wickwire Bridge" is about four and one-half miles from Fetterman, which is the first telegraph station after Grafton. The "slowing down" of No. 7 was a radical departure from the schedule running time of the passenger train, between those points, concerning which "slowing down" no notice whatever was given to Hardman, engineer of defendant's extra 2610, by defendant's train despatcher or telegraph operator. Hardman, engineer on extra 2610, testified that he could have avoided a collision with No. 7 if he had received a train order or telegraphic message from defendant's telegraph operator or train despatcher, stating that No. 7 would "slow down" or stop near the "Wickwire Bridge"; and further, that the flagman of No. 7 was not on the rear end of the platform when he, Hardman, first saw the passenger train immediately prior to the collision (Record, 47); that Hardman stopped his engine as quickly as he could; that the track at the point of the collision was curved to the left—a heavy curve; that Hardman did not hear a whistle sound from No. 7 as a signal for the flagman on No. 7 to go back and place torpedoes on the track; that when Hardman first saw No. 7, immediately

prior to the collision, he thought No. 7 was standing still (Record, 46).

Defendant's extra 2610, running light, arrived at Fetterman at 1:47 a. m., and remained there until 2:17 a. m., on a siding, waiting for No. 7 to pass. When 5 minutes had elapsed, after No. 7 passed Fetterman, the telegraph operator gave an order or clearance signal to Hardman, of extra 2610, to proceed. He followed No. 7 (Record, 45).

As information was given to No. 7 to slow down between Fetterman and Valley Falls, it was, of course, the duty of the defendant to notify Hardman, whose extra engine was following No. 7, of the radical change in the schedule running time of No. 7. The failure to do so constituted negligence (Northern Pacific Ry. Co. *vs.* Mix, 121 Fed., 476).

It is charitable to assume that the defendant neglected to notify its operator at Fetterman that No. 7 would slow down just beyond Fetterman, otherwise he would not have given the "clearance" to Hardman, after No. 7 had been out of Fetterman 5 minutes. If he knew that No. 7 was to slow down or stop between Fetterman and the point where the collision occurred, a distance of two or three miles, then it was criminal negligence on his part to give Hardman the "clearance" to proceed with his light engine, which he undoubtedly knew to be capable of making very high speed as it was not burdened with a train of cars. If the operator at Fetterman did not know that No. 7 would slow down or stop between Fetterman and Valley Falls, then it was gross negligence on the part of the defendant, or its train despatcher or its operator at Grafton in failing to notify said operator at Fetterman, so that he, in turn, might advise Hardman, the engineer of extra 2610. In either case, the negligence is conclusively established.

Hardman testified that he received no train orders, on the occasion in question, concerning the condition of defendant's track between Fetterman and Fairmont, which is beyond Valley Falls; that he received no train orders whatever, except the "clearance" from the operator at Fetterman, giving

him permission to proceed. He testified that the rate of speed of No. 7 between Grafton and Fairmont, in April, 1910, was 35 to 55 miles an hour, and that No. 7 did not usually stop between Grafton and Fairmont (Record, 45).

In other words, Hardman was led to believe, at the time he ran his engine out of Fetterman, that No. 7 was running as it usually did, which meant to his mind that No. 7 was then quite beyond the point where the collision occurred, and No. 7 would not slow down or stop until it reached Fairmont, a distance of 20 miles from Fetterman. Hardman's engine ran into No. 7 about 3 miles from Fetterman (Record, 46); that at the time of the collision Hardman's engine was running "as near 25 miles an hour as I could figure it out" (Record, 46).

In Northern Pac. Ry. Co. *vs.* Mix, *supra* (121 Fed., 476), the court held:

> "Plaintiff, who was head brakeman on a train known as '162 East,' was injured by a head-end collision with another train known as '159 West.' Train 162 East was started under an order which made no reference to train 159 West, and no effort was made by defendant's train despatcher to inform the operatives of train 162 East of the other train until some time after the train had left B., and until after the lapse of time within which train 162 East should have been expected to pass the only station at which it could have received such information, when the despatcher called the operator, who erroneously reported that the train had not yet arrived, he having been asleep when the train passed. The despatcher then issued orders which resulted in the collision. *Held*, that whether the train despatcher was guilty of negligence in failing to timely send notice to train 162 East where to meet and pass 159 West was for the jury."

Hardman further testified that as his engine was following No. 7, the defendant's train despatcher should have given

him a copy of the order changing the schedule time of trains ahead of him. And he further testified that he could have avoided the collision in question if he had received a train order or telegraphic message stating that No. 7 was to slow down or stop near the Wickwire Bridge, 3 miles from Fetterman.

Hardman further testified that he drove his engine around the big curve at the Wickwire Bridge and the first thing he saw was No. 7's deck lights, and his engine was then within 30 or 40 feet of No. 7, and he could not stop in time to avoid the collision. He thought No. 7 was standing still.

Other acts of negligence are:

(*a*) The failure of the defendant company, by its crew on No. 7, after No. 7 commenced to slow down, to place torpedoes on the track as a warning to following trains of such slowing down or stop.

(*b*) The failure of the engineer to sound a whistle signal for the flagman to go back and flag following trains.

In Hayes *vs.* Michigan Central R. R. Co., 111 U. S., 241, the court says:

> "The rule laid down by Willes, J., in *Daniel vs. Metropolitan Railway Company,* L. R. 3, C. P. 216, 222, and approved by the Exchequer Chamber, L. R. 3, C. P. 591, and by the House of Lords, L. R. 5, H. L. R., was this: 'It is necessary for the plaintiff to establish by evidence circumstances from which it may fairly be inferred that there is reasonable probability that the accident resulted from the want of some precaution which the defendant might and ought to have resorted to.' "

In Great Northern Ry. Co. *vs.* Sloan, 196 Fed., 275, *supra* (rear-end collision), the court says:

> "There is certainly evidence tending to show gross carelessness amounting to recklessness in operating the train. The freight train that ran into and caused the wreck of the forward train left Edwall 1 hour

and 45 minutes after plaintiff's train had left. The following train was a slow freight train and was not being operated to overtake the forward train, which was of lighter tonnage and a faster train; nevertheless, in the short distance of 15 miles, it did overtake the forward train after having been delayed at Edwall an hour and 45 minutes. The conductor of the forward train testified that he dropped a fuse off at the mile-board, presumably a mile from the station at Galena, and he says that this fuse should have burned 10 minutes, and he expected it would protect his train sufficiently so that at the station he could walk back far enough to flag the following train. It did not protect the train or serve to signal the train following 15 minutes later, and he had no right to expect that it would. It burned out before the following train reached the point where the fuse had been dropped. The forward train had been at the station 15 minutes before the collision. In other words, the fuse had burnt out at least 5 minutes before the following train reached the point where it was to have been a signal to the following train to stop, and the forward train was still on the main track with its two rear cars. *A rule of the road, as well as the rule of ordinary care for human life, required that the conductor or brakeman should have gone back immediately upon the stopping of his train with stop signals for the following train, and to a sufficient distance and for a sufficient time to insure full protection for the forward train.* It is clear that for some reason either the rear brakeman or the conductor of the forward train, or perhaps both, did not do his or their duty in signaling the following train, and that he or they was or were grossly careless in not doing so. This evidence of gross carelessness and recklessness probably accounts for the absence of the brakeman from the witness stand. We are of opinion, therefore, that if the plaintiffs were deemed to have been trespassers, the evidence was sufficient to have justified the jury in finding the defendant operated its train so recklessly and in such disregard of plaintiff's personal safety that defendant was liable in that aspect of the case."

In Pennsylvania Railroad Co. *vs.* Goughnour, 208 Fed., 961 (C. C. A.), the court held that where a freight conductor was injured in a collision, due to the failure of his flagman to protect the rear end of the train, the flagman's negligence was the negligence of the railroad company as a matter of law.

The evidence of the defendant's negligence should have been submitted to the jury. Texas & Pac. Ry. Co. *vs.* Gentry, 163 U. S., 353; Chicago & N. W. Ry. Co. *vs.* O'Brien, 82 C. C. A., 461 (S. C., 153 Fed., 511); Hough *vs.* Texas & Pac. R. R. Co., 100 U. S., 213.

The defendant's counsel waived cross-examination of Hardman, its engineer, whom the plaintiff produced as a witness (Record, 47). The defendant company offered no testimony whatever to meet the plaintiff's evidence upon the subject of its negligence.

Under the Employers' Act, the defendant is liable, if, through other employees, it is guilty of any causative negligence, no matter how slight, in comparison to that of the plaintiff, and that the total damages should be proportioned between plaintiff and defendant according to their respective fractions of the total negligence (Norfolk & Western Ry. Co. *vs.* Earnest, 229 U. S., 114; Grand Trunk Co. *vs.* Lindsay, 233 U. S., 42).

Error 8.

Is the Pullman Car a Vehicle of a Common Carrier Independent of the Railroad Company?

Mr. Justice Van Orsdel, speaking for the court of appeals in the instant case, which was decided March 10, 1913, says:

> "The Pullman Company employed plaintiff in the capacity of porter, and he was acting as such in one of the company's cars at the time he was injured. The car was not operated nor controlled by defendant. Defendant, under its agreements with The Pullman

Company, was simply hauling the car. True, it was hauled for the accommodation of the passengers traveling upon defendant's train. But the railroad company assumed no responsibility for the management of the car or its equipment. The Pullman Company sold passengers the tickets which entitled them to the privileges of its car. The proceeds went to The Pullman Company. Its conductor and porter looked after the accommodation of the passengers while in and about the car. In fact, so far as the control of the car was concerned, it was as complete as if the entire train had been operated by The Pullman Company. The railroad company in its contract with its passengers did nothing that limited The Pullman Company's control of its cars. The duty which the railroad company assumed to carry its passengers safely, whether in its cars or in the cars of The Pullman Company, arose from its contract in the sale of tickets entitling them to transportation, and not from their purchase from The Pullman Company of tickets entitling them to the additional privilege of riding in its cars" * * * (Record, 55).

"In their relation to the railroad company, we think there is a marked distinction between an express messenger and a Pullman porter. As was suggested in the Voigt case (176 U. S., 498), the express messenger occupied a position created by agreement between the express company and the railroad company. He performed duties which, if not performed by him, would have to be performed by the railroad employees. Express matter, when received by the railroad company, under its contract with the express company, like freight, has to be handled and cared for. If not looked after by the agents of the express company, the duty would devolve upon the employees of the railroad company. Not so with a Pullman car. It is a vehicle of a common carrier independent of the railroad company. The mere fact that The Pullman Company employs the railroad company to haul its cars does not affect its relation to the public. The railroad company is not under obligation to haul Pullman cars, as it is at common law to carry passengers and freight. * * * Passengers occupy

> Pullman cars under contract with The Pullman Company, and not the railroad company. The service rendered by the porter forms no part of the contractual duty of the railroad company to its passengers. 'It is no part of the contract or obligation of a common carrier of passengers to furnish berths, or the services of a porter to make up beds or perform other services for passengers. The passenger pays The Pullman Company for the services performed by it, and not the railroad company, and if one desires such services as are rendered by The Pullman Company and its porter he must contract with that company for them.' Chicago, R. I. & P. Ry. Co. *vs.* Hamler, 215 Ill., 525. On the other hand, the porter performs no service connected with the operation of the train by the railroad company. In fact, when a passenger purchases a berth in a Pullman car he must look entirely to The Pullman Company for the service of a porter" (Record, 56-57).

At the same term, in another case decided June 2, 1913, entitled *Robinson vs. Southern R. Co.* (40 App. D. C., 549, 557), in which the plaintiff, while a passenger on a Pullman sleeping car attached to a train of the railway company, sued the railway company and The Pullman Company to recover $40 contained in his pocket-book, which the plaintiff alleged was stolen while he was occupying a berth in the sleeping car, Mr. Justice Van Orsdel, speaking for the court of appeals, after holding that The Pullman Company was liable in the action, said, in reference to the railway company (page 554):

> "In cases of this sort, the liability of the railroad company and The Pullman Company is both joint and several. This rule of liability is based upon sound principles of public policy. It will not do to say that a passenger who takes a berth in a Pullman car releases the railroad company from any of its duties as a carrier. The Pullman car forms part of the railroad company's train. The railroad company requires the passenger to purchase a first-class ticket—

the highest and most expensive contract—as a condition precedent of being permitted to avail himself of the accommodation of the sleeping car. The railroad company is required, therefore, to exercise reasonable care for the protection of the effects of its passengers in the daytime and those occupying day coaches, and, like The Pullman Company, it is obliged to exercise constant watchfulness over the passenger through the night while sleeping in his berth. A passenger is there by the joint invitation of the two companies, and it will not do to permit one to shift its responsibility to the other, or to indulge in technical distinctions as to their liability. As the court said in Campbell *vs.* Seaboard Air Line R. Co., 83 S. C., 448; 23 L. R. A. (N. S.), 1056; 137 Am. St. Rep., 824; 65 S. E., 628: 'When, in pursuance of such invitation, the passenger takes the Pullman car, he is still entitled to the service of the railroad employees in all matters which relate to his safe and comfortable transportation to his destination. *Obviously, the railroad company cannot lawfully withdraw its own employees from this service and substitute and rely upon the employees of another company to perform the service, as persons acting apart from itself.* On the contrary, it is quite plain that when it relies on such persons to perform its own public duties, it adopts them as its agents, and is responsible for their failure to perform the service to which the passenger is entitled as a part of his contract of carriage.' [Italics ours.]

"Under this rule of liability, it has been held that the sleeping car company and its employees engaged in the operation of its cars are in law the servants and employees of the railroad company. In *Pennsylvania Co. vs. Roy,* 102 U. S., 451; 26 L. Ed., 141, the court said: 'The law will conclusively presume that the conductor and porter, assigned by The Pullman Palace Car Company to the control of the interior arrangements of the sleeping car in which Roy was riding when injured, exercised such control with the assent of the railroad company. For the purposes of the contract under which the railroad company undertook to carry Roy over its line, and, in view of its obligation to use only cars that were adequate for

> safe conveyance, the sleeping car company, its conductor, and porter, were, in law, the servants and employees of the railroad company. Their negligence, or the negligence of either of them, as to any matters involving the safety or security of passengers while being conveyed, was the negligence of the railroad company. The law will not permit a railroad company, engaged in the business of carrying persons for hire, through any device or arrangement with a sleeping car company whose cars are used by the railroad company, and constitute a part of its train, to evade the duty of providing means for the safe conveyance of those whom it has agreed to convey."

In Pickard *vs.* Pullman Southern Car Co., 117 U. S., 34, 51, the court declared void an act of Tennessee, which imposed a privilege tax of $50 per annum on every sleeping car, used or run over a railroad in that State, and not owned by the railroad, so far as said act applied to interstate transportation.

The contract between the sleeping-car company and the railroad, set forth in the opinion, is, in all essential respects, the same as in the case at bar.

After reciting the provisions of the said contract, the court, among other things, says:

> "For purposes of transit, it (the railroad company) dealt with the cars as it would with cars owned by itself (pp. 45-46). * * * The tax was really one on the right of transit, though laid wholly on the owner of the car. So, too, the service rendered to the passenger was a unit. The car was equally a vehicle of transit, as if it had been a car owned by the railroad company, and the special conveniences or comforts furnished to the passenger had been furnished by the railroad itself" (page 46).

It is well settled that sleeping-car companies are not common carriers of the goods of passengers, nor are they liable as innkeepers. Hutchinson on Carriers (ed. 1906), section 1130, citing numerous cases.

The status of sleeping-car companies operated in connection with railway trains is not that of a carrier of goods or passengers (Lemon *vs.* Pullman Palace Car Co., 52 Fed. Rep., 262; Meyer *vs.* St. Louis, etc., R. Co., C. C. A., 54 Fed. Rep., 116); nor is it that of an innkeeper (Blum *vs.* Southern Pullman Palace Car Co., 1 Flipp. [U. S.] 500). In Illinois it seems that they are regarded as nondescript corporations (Pullman Palace Car Co. *vs.* Lawrence, 74 Miss., 782; Nevin *vs.* Pullman Palace Car Co., 106 Ill., 222).

Hutchinson on Carriers (ed. 1906), section 1136:

> "The cars of the sleeping-car company, being under the control of the railroad company except as to furnishing lodging to those who pay for it, the agents of the railroad company are entitled to determine who shall occupy the sleeping-cars, as part of the train. Thus an agent of the railroad company may, under its regulations, refuse to sell a berth ticket to one not holding a first-class ticket (Lemon *vs.* Pullman Palace Car Co., 52 Fed., 262; Lawrence *vs.* Pullman Car Co., 144 Mass., 1; Pullman Palace Car Co. *vs.* Lee, 49 Ill. App., 75)."

The passenger, upon purchasing a ticket purporting to entitle him to a continuous passage, is entitled to a passage in the berth for which he holds a ticket, or in one equally desirable in point of safety, convenience, and comfort (Pullman Palace Car Co. *vs.* Taylor, 65 Ind., 153; Pullman Palace Car Co. *vs.* Pollock, 69 Tex., 123). It is no defense to a breach of the company's contract in such regard that it simply furnished the cars to the railroad company for the use of passengers for a certain rent, pursuant to a contract between it and the railroad company (Pullman Palace Car Co. *vs.* Taylor, 65 Ind., 153).

In Louisville, Nashville & Great Southern R. R. Co. *vs.* Katzenberger, 16 Lea (Tenn.), 380, K. purchased a railroad ticket and also a Pullman over the L. & N. railroad from Cincinnati to Memphis. The Pullman car ticket had printed upon its face "wearing apparel or baggage placed in the car

will be entirely at the risk of the owners." K. turned his valise over, on entering the Pullman car, to the Pullman porter. At G. the valise was missed and could not be found. The court held, in an action to recover the value of the valise and contents, that the railroad was liable for the loss of plaintiff's property; that no contract with The Pullman Company could relieve the railroad company from such liability.

Even though a passenger of the railroad company is riding in a Pullman car, the railroad company owes the passenger the duty to care for his comfort and safety. This duty of protecting the personal safety of the passenger and promoting, by every reasonable means, the accomplishment of his journey is continuous, and embraces other attentions and services than the occasional service required in giving the passenger a seat or some temporary accommodation. Hence, whatever is done by the carrier or its servants which interferes with or injures the health or strength or person of the traveler, or prevents the accomplishment of his journey in the most reasonable and speedy manner, is a violation of the carrier's contract and he is responsible for it (Dwinelle *vs.* N. Y. C. & H. R. R. Co., 120 N. Y., 117).

The railroad company, as a common carrier, is bound, as far as practicable, to protect its passengers, while being conveyed, from violence committed by strangers and co-passengers (Steamboat Co. *vs.* Brockett, 121 U. S., 637), and we submit the rule is the same even though the passengers of the railroad company are riding in the Pullman car. It is the further obligation of the railroad company to provide the passenger with the usual accommodations and any information and facilities necessary for the full performance of the contract upon the part of the carrier (Dwinelle *vs.* N. Y. C. & H. R. R., 120 N. Y., 122; P., C. & S. L. R. Co. *vs.* Krouse, 30 Ohio St., 224). How can it be, as held in the instant case by the court of appeals, that (Record, 56) "in fact, so far as the control of the [Pullman] car was con-

cerned, it was as complete as if the entire train had been operated by The Pullman Company?

If the railroad company hauls the Pullman car as part of its train, in virtue of contractual relations with The Pullman Company, on a partnership basis; accepts the "necessary employees" in the Pullman car, upon condition that said employees shall be bound by all of the rules and regulations governing its (the railroad) employees and subject to the control of the railroad company, for the very purpose of performing all of the duties laid by law upon the railroad company, as between it and its passengers, can it be, as decided by the court of appeals, in this case (Record, 57) that such "necessary employees" perform no service connected with the operation of the train?

Or, is the ruling of the court below (Record, 57) that "the *mere* fact that The Pullman Company employs (?) the railroad company to haul its car does not affect its relation to the public" a correct analysis of the matter?

"The cars of the sleeping-car company, being under the control of the railroad company except as to furnishing lodging to those who pay for it, the agents of the railroad company are entitled to determine who shall occupy the sleeping-cars, as part of the train. Thus an agent of the railroad company may, under its regulations, refuse to sell a berth to one not holding a first-class ticket." 2 Hutchinson on Carriers (ed. 1906), section 1136, citing Lemon vs. Pullman Palace Car Co., 52 Fed., 262; Lawrence *vs.* Pullman Car Co., 144 Mass., 1; Pullman Palace Car Co. vs. Lee, 49 Ill. App., 75.

It is respectfully submitted that the judgment of the court of appeals should be reversed, with directions to reverse the judgment of the trial court and remand the case for a new trial.

ALEXANDER WOLF,
LEVI H. DAVID,
Attorneys for Plaintiff in Error.

SUBJECT INDEX.

AUTHORITIES CITED.

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STATUTES.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 167.

GEORGE R. ROBINSON, PLAINTIFF IN ERROR,

vs.

BALTIMORE & OHIO RAILROAD COMPANY, A CORPORATION, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR DEFENDANT IN ERROR.

Statement.

The question involved is whether a Pullman porter, employed solely by, and under contract with the Pullman Car Company alone, injured while in the discharge of his duties in a Pullman car of an interstate train, and injured through the alleged negligence of the servants and employees of the Railroad Company, of whose train the Pullman car was a

ly

part, is an employe of such Railroad Company, and as such entitled to maintain his suit for damages against the Railroad Company under the provisions of the Employers' Liability Act of April 22, 1908 (35 Stats. at L. 65, C. 149).

The plaintiff in error, George R. Robinson, plaintiff below, and hereinafter called plaintiff, sued the defendant in error, the Baltimore & Ohio Railroad Company, hereinafter called the defendant, to recover damages for injury caused by a collision between trains of the defendant.

From the declaration (Rec., pp. 1 to 7, inclusive) it appears that at the time of the accident plaintiff "was engaged and employed as a porter by the Pullman Company, a body corporate, upon, in, on, and about a certain car known as the Milton, belonging to said Pullman Company," and that the train, of which the Milton formed a part, was an interstate one.

Plaintiff further alleged there was a contract between defendant Railroad and the Pullman Company, under which the latter furnished parlor and sleeping cars for the accommodation of defendant's passengers, and that under this contract (which is set out in full, Rec., pp. 27 to 30, inclusive) plaintiff was the common employe of the Pullman Company and the defendant Railroad, and that the defendant's servants and employes, whose negligence caused the accident, were "fellow-servants of plaintiff."

At the trial in the *nisi prius* court this contract, and also the contract of employment between the plaintiff and the Pullman Company (set out in full, Rec., pp. 36, 37) were received in evidence. *By this contract, which was signed by plaintiff, the plaintiff expressly released all railroads, over whose lines Pullman cars were operated, from all claims for liability of any nature or character on account of personal injury to plaintiff while in the employment or service of the Pullman Company.*

At the conclusion of all the testimony offered by plaintiff (the contract of employment having been admitted by the

court on plaintiff's cross-examination, and over plaintiff's objection, Rec., pp. 37, 38, 39), and on motion of defendant, the court directed the jury to find a verdict for defendant, and this because, in the opinion of the court, the plaintiff was not an employe of the defendant Railroad, and therefore the release of the plaintiff stood as a bar to recovery against the defendant.

On appeal by plaintiff to the Court of Appeals of the District of Columbia the judgment of the court below was affirmed (Rec., pp. 53 to 59, inclusive), and the case is here on writ of error allowed by the Honorable, the Chief Justice of this Court, granted on plaintiff's petition, which alleged that the construction of the Federal Employers Liability Act of 1908 was drawn in question by the defendant.

Counsel for plaintiff use thirty pages of their brief in presenting a detailed statement of the case, and we content ourselves with this short outline, simply adding that certain testimony and facts not recited in plaintiff's statement will be referred to later; and further, that plaintiff's suit and right of recovery being based in fact on the Federal Act, it may be asked whether the construction of this law was drawn in question by plaintiff or defendant. If by the plaintiff, the judgment of the Court of Appeals probably can not be re-examined.

ARGUMENT.

First.

The Plaintiff Was Not an Employe of the Defendant Railroad, and, Therefore, Not a Beneficiary of Any of the Provisions of the Employers' Liability Act.

This Court has frequently held that the legislative intent must be taken as expressed by the words which the legislature itself employed. If plaintiff's contention be sustained, the language of the act must be broadened and extended so as to cover under its protective clauses persons other than those selected and named by the Congress.

The title of the act reads "An Act relating to the liability of common carriers by railroads *to their employes* (Italics here and hereafter ours) in certain cases."

The first section provides that

> "every common carrier by railroad while engaging in commerce between * * * shall be liable in damages to any person suffering injury *while he is employed by such carrier in such commerce.*"

The Employers' Liability Act of 1906 was broader than the Act of 1908, in that it included every common carrier engaged in interstate trade or commerce. The present act limits its operation absolutely to *common carriers by railroad,* and for proper legislative reasons Congress bestowed upon their employes opportunities for the recovery of damages not existing under the rules of the common law.

The Act of 1908 segregated common carriers by railroads from all other common carriers, placed them in a distinct class and imposed upon them certain liabilities in regard to their employes not imposed on other common carriers.

It likewise segregated the employes of such railroads, and

clothed them with certain legal rights not granted to employes of other interstate common carriers.

The law declared a new public policy applicable, however, to railroads and their employes when both are engaged in interstate commerce. It created new causes of action and destroyed old defenses, but wrote in the law a controlling limitation. By this limitation the liability of railroads only was increased, and this only for the benefit of the railroads' own employes.

The plaintiff was employed by the Pullman Company alone; he was paid by it alone; his retention in service or his discharge from service was determined by the Pullman Company alone. He was working at the time of the accident for this company, in one of its own cars. He was rendering service to the persons who had paid the Pullman Company for this service, which was of a type and quality and character not required by law to be rendered to a passenger by the railroad. Yet the argument is made that a Pullman porter, not employed by the operating railroad company, and notwithstanding the apt and exact language of the act, should be held by this Court to be an employe of the defendant railroad.

In Shaw vs. Railroad Co., 101 U. S., at page 565, this Court said:

> "No statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express."

In Bate Refrigerating Co. vs. Sulzberger, 157 U. S., pp. 36, 37, the court said:

> "In our judgment the language used is so plain and unambiguous that a refusal to recognize its natural, obvious meaning would be justly regarded as indicating a purpose to change the law by judicial action based upon some supposed policy of Congress. But, as declared in Hadden vs. Collector, 72 U. S., 107,

'what is termed the policy of the government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes.' 'Where the language of the act is explicit,' this court has said, 'there is great danger in departing from the words used, to give an effect to the law which may be supposed to have been designed by the legislature. * * * It is not for the court to say, where the language of the statute is clear, that it shall be so construed as to embrace cases, because no good reason can be assigned why they were excluded from its provisions.' Denn vs. Reid, 10 Pet., 524."

The two Employers' Liability Acts were considered most carefully by the Judiciary Committee of the House of Representatives and of the Senate—both committees composed of lawyers of broad experience, large reading and fullness of information. It can not be assumed that they were ignorant of court decisions holding directly and distinctly that porters and express messengers were not employes of the railroad company. It is not possible that they were ignorant of State statutes which had been enacted, where, under the broad, clear, and inclusive language of the statutes, porters and express messengers were included, and where, under the language of these statutes, a release executed by them would not be a valid defense. If it had been the purpose of Congress to include porters and express messengers within the provisions of the act, the change of only a few words was necessary.

Authorities Supporting the Point That Plaintiff Was Not an Employe of the Defendant Railroad.

(1) McDermon vs. Southern Pacific Co., 122 Fed. Rep., 669. Decided May 18, 1903:

McDermon was a Pullman car porter, securing his employment with the Pullman Company under a contract set out in the opinion, and similar to the one at bar. He was injured while in the performance of his services as a porter in one of the sleeping cars of the Pullman Company, and in a rear-end collision. The facts are virtually identical with those in this case.

The legislature of Missouri enacted a law commonly known as the Fellow Servants' Law, and section 2876, Revised Statutes of Missouri, 1899, reads as follows:

> "No contract made between any railroad corporation and any of its agents or servants, based upon the contingency of the injury or death of any agent or servant, limiting the liability of such railroad corporation for any damages under the provisions of this act, shall be valid or binding, but all such contracts or agreements shall be null and void."

The defendant Railroad, in its answer, plead the contract between itself and the Pullman Company, similar to the one in this case (Rec., pp. 27 to 30, inclusive), and also the contract between the plaintiff and the Pullman Company, similar, as said above, to the one relied on here.

The plaintiff moved to strike out this plea as constituting no defense to his cause of action, because under the Missouri law above quoted, the contract in question was contrary to the public policy of the State.

Plaintiff's counsel relied upon the decision of this Court in Baltimore & Ohio Southwestern Railroad Company vs.

Voigt, 176 U. S., 498. The court in its opinion carefully considered this opinion, and said:

> "The court did not assert that the express messenger was an employe of the carrier corporation, but that he more nearly resembles that of an employe than that of a passenger."

The court further said, referring to the State Statute, at page 674:

> "The State Statute in question applies by its express terms alone to a contract made between any railroad corporation and any of its agents or servants. The terms 'agent' and 'servant' of a railroad company have such a well-defined meaning in ordinary as well as legal acceptation as to admit of no cavil or debate. It is not any corporation, but a railroad corporation named by the statute, and it is its agents and servants alone with whom it may not make such contracts. In other words, it is restricted to the instance where the relation of master and servant exists between the railroad corporation and the other party. The plaintiff, as already stated, was neither hired nor paid by the defendant company. It exercised no control over him, nor could it discharge him. The relation of master and servant existed alone between the Pullman Company and the plaintiff. He had entered the service of the latter company, and subscribed alone to its rules and regulations. He took orders and received his compensation from, and could be discharged alone by, that company."

The court had previously quoted from the contract between the plaintiff and the Pullman Company, including these words:

> "I will obey all rules and regulations made or to be made for the government of their own employes by the corporations or persons over whose lines of railroad the cars of The Pullman Company may be operated while I am traveling over said lines in the employment or service of said The Pullman Company."

But this was a contract between the plaintiff and the Pullman Company, and followed similar language in the agreement and contract between the Railroad Company and the Pullman Company, wherein the Pullman Company (sec. 3, Rec., p. 27) was required to provide the necessary employes on the Pullman cars, which employes were subject to the rules of the Railroad Company governing "its own employes."

This provision is eminently necessary in connection with the operation of railroad trains of which a Pullman car may be a part, but both the contract between the Railroad defendant and the Pullman Company, and the Pullman Company and the plaintiff, in the apt language used, distinctly draw the line of separation between the employes of the Railroad and the Pullman Company, and this separation and division plaintiff recognized when he signed the agreement.

At page 678 attention is called in the opinion to the fact that in the State of Ohio, where the Voigt case, *supra*, originated, 87 Ohio Laws, page 149, it was unlawful for any railroad company to require of any of *its employes* to agree in advance to hold the corporation blameless for any injury sustained, for which otherwise he might recover damages from the company, and the fact that this provision was not referred to either by counsel or the court was persuasive evidence that neither counsel nor court considered this provision as applicable to the instance of a contract between the express company and its messenger.

(2) CHICAGO, &C., RAILROAD COMPANY vs. HAMLER (Illinois Supreme Court, June 23, 1905), 215 Ill., 525:

Hamler was a porter in the employ of the Pullman Company, serving on a sleeping car attached to a passenger train of the railroad, and was injured through the alleged negligence of the railroad company. On the trial the defendant

railroad offered in evidence the contract of employment between Hamler and the Pullman Company, similar to the one at bar. The court said:

> "It is contended that plaintiff was a servant of the defendant, and that the contract was also void as a contract between master and servant. The declaration averred that the plaintiff was in the employ of the Pullman Company, and, as a question of fact, the uncontradicted evidence was that the Pullman Company owned the car and had charge of its operation; that it employed the men who ran its cars, paid the porters; and that the defendant paid a compensation to the Pullman Company for running the Pullman cars over its road. *The master of a servant is one to whose order he is subject, and the plaintiff was not subject to the order of the defendant in any particular, and, therefore, was not its servant.*"

(3) HUGHSON vs. RICHMOND & DANVILLE R. R. Co., 2 D. C. App., 98 (decided in January, 1894):

Hughson was a Pullman porter, and sued the defendant railroad for injuries caused by alleged negligence on the part of its employes. The court indicated that the principal question on the appeal was, in whose service or employ was the plaintiff at the time of the occurrence of the accident, and it will be noted that the contract between the Pullman Company and the Railroad Company, as set out on page 101 of the opinion, contained these words:

> "It is hereby mutually agreed that the said employes of the Pullman Company, named in Article 2 of this contract, shall be governed by and subject to the rules and regualtions of the railway company, which are, or may be, adopted from time to time, for the government of its own employes."

In referring to the agreement, the court said:

> "The agreement is based upon the assumption that the agents and employes of the respective companies

were not serving the same common master, nor engaged in the same common employment; but that the agents and servants of the Pullman Company were engaged in a separate and distinct employment, receiving their compensation from, and remaining subject to the exclusive control and direction of, a separate and independent master, from the railroad company, and hence the provisions for transporting them free of charge, while in the performance of duty for the Pullman Company. There was no contract whatever existing between the plaintiff and the railroad company, nor service to be rendered by the former to the latter; and, therefore, there could be no implied contract that, in consideration of employment and the payment of wages, the plaintiff would assume the risk of injury that might result from the negligence of the employes of the railroad company."

And at page 103:

"But though the plaintiff was not a servant of the railroad company, and, therefore, not a co-servant with the employes of that company, and consequently not subject to the principle of non-liability of the master for the negligence of his servant producing an injury to a fellow-servant, yet the plaintiff was not a passenger," etc.

(4) DENVER, &C., R. R. CO. VS. WHAN (Colo.), 11 L. R. A., n. s., 432, decided in 1907:

Whan, the plaintiff below, was employed by the Pullman Company as a conductor on a sleeping car attached to a train operated by the railroad. The train was derailed, Whan injured, and brought his suit for damages. The contract between Whan and the Pullman Company, and between the Pullman Company and the Railroad Company, were virtually identical in words with the contracts before the court in the case at bar.

At page 442 the court said:

"The Pullman Company was operating the sleeping car Toltec under a special arrangement with the defendant. Its purpose in so doing was to derive revenue from passengers on the train of the defendant to which this car was attached, who desired to ride therein. The money paid by such passengers was collected by the Pullman Company and belonged to it. These collections were made by, and the car was in the charge of, the plaintiff as an employe of the Pullman Company. It was within the scope of the powers of the defendant to enter into the arrangement with the Pullman Company it did; but it was under no obligation to do so, or to haul the car of the Pullman Company for the purposes for which it was being hauled. (Authorities cited.) The plaintiff was not riding on the train of the defendant by virtue of any personal contract right, but as an employe of the Pullman Company, and because of a contract between the Pullman Company and the defendant. He was not a passenger between the points the train was being operated, and his occupation of the car was but an incident of his employment by the Pullman Company. The defendant was under no obligation except as fixed by the contract between itself and the Pullman Company to permit him to be upon its train in the capacity he was. The Pullman Company was under no obligation to employ him. The contract by which he secured employment with the Pullman Company was deliberately entered into. By the terms thereof, he expressly released the defendant from all claims for liability of any nature or character on account of any personal injury while traveling over its lines in the capacity of an employe of the Pullman Company. Not being under any legal obligation to haul the cars of the Pullman Company for the purpose mentioned in its contract with that company, and not being under any obligation to transport the plaintiff over its lines in the capacity he was riding, the defendant had the legal right to dictate the terms upon which it would haul the cars of the Pullman Company for the purposes mentioned, and the conditions under which its employes

might ride therein when being so hauled. (Authorities cited.)

"Such contracts as we are considering are not against public policy, and may be enforced, because their conditions are in no sense injurious to the interests of the public."

And again, referring to certain provisions of the Constitution of Colorado, the court said (p. 446):

"* * * Section 15 says that a contract of an employe to release his employer from liability for the negligence of the latter shall be void. Counsel for plaintiff assert no rights under this provision, further than to urge that, because of its presence in the Constitution, we should hold contracts of the character under consideration void, as against public policy. We do not wish to be understood as construing this provision; but it does not purport, nor is it claimed, so far as the railroad company is concerned, to cover contracts of the kind pleaded; and we do not see how it can have any bearing upon the question of public policy with respect to contracts of a totally different character from those contemplated."

It is perfectly evident that counsel for plaintiff did not for a moment assume that under the language of the Colorado Constitution the Pullman porter could be considered an employe of the railroad company in a suit of this kind, and the language of the court shows in its opinion that the contract in question being one between the Pullman Company and the plaintiff, was not a contract of the character included by the constitutional provision, which referred to contracts of an employe releasing his employer.

(5) Missouri, &c., R. R. Co. vs. Blalack et al., 105 Texas Reports, 297:

Blalack was an express messenger, and killed while in the performance of his duties on a train of the railroad. In this case the defendant railroad insisted that as decedent

Blalack was an employe of the Railroad Company, and being killed while engaged in interstate commerce, the liability of the railroad must be determined under the Employers' Liability Act, and not under the law of the State of Texas. The court, at page 297, said:

> "The Railroad pleaded that Blalack was in its employ at the time, but the only proof offered was that Blalack handled baggage, which was the work of an employe. There was no proof of any employment of Blalack by the Railroad Company, nor of the payment of any part of his wages, nor of any right of control over him. If the facts existed, it was so easy to have produced the evidence that the failure to do so impressed upon the mind the conviction that the claim was unfounded. The defendant was required to prove that deceased was in its employ in order to avail itself of the Federal Law, and having failed, the State law governs."

(6) MISSOURI, KANSAS, &C., R. R. CO. vs. WEST, 134 Pac., 655 (Oklahoma, 1913):

This was an action brought by a widow for the benefit of herself and children, under a State statute, against the Railroad Company, because of the death of her husband caused by a railroad accident. The deceased was employed by the American Express Company as a messenger, and in addition to his duties of express messenger, he handled baggage of inter and intra-state passengers of the Railroad Company, though he performed this service by virtue of his employment by the Express Company. Here, again, the Railroad Company claimed that the decedent West was in its employ. In construing the meaning of the word "employ" as used in the Federal Employers' Liability Act, the court says, at page 658:

> "Moreover, there are no averments in the pleadings from which an inference may be reasonably drawn that any contract of employment was ever entered into between the deceased and the Railroad

> Company. The language of the act of Congress carries with it the idea and the essence of a contract. To be employed by one is to be engaged in his service, to be used as an agent or substitute in transacting his business, to be commissioned and intrusted with the management of his affairs. In our judgment the words 'while employed by such carrier' construed in connection with the context, is equivalent to 'while hired by such carrier,' which implies a request under the contract for compensation. The persons falling within the meaning of the act are those hired by the Railway Company or those who are working for it at its request and under an agreement on its part to compensate them for their services."

(7) DAVIS vs. CHESAPEAKE & OHIO RY. CO., 5 L. R. A., n. s., 458; 92 S. W., 339:

The plaintiff Davis was employed by the Adams Express Company as a messenger, and while on one of the Railroad Company's trains was injured by the negligence and carelessness of its employes. The principal defense relied on was a contract of release which the Adams Express Company required the appellant to execute upon entering its service, and it is quite similar to the release executed by the plaintiff Robinson herein.

The court said:

> "The express messenger is not a trespasser because he is being transported by the Railroad Company under a contract, and for the same reason he is not a licensee. *He is an employe of the Express Company and not of the Railroad Company.*"

(8) JONES vs. ST. LOUIS, &C., RY. CO., 125 Mo., 666:

The plaintiff was injured while employed as a car porter of the Pullman Company by virtue of a contract similar to the one at bar. He sued the Railroad Company for damages, and one question before the court was whether servants

of the Pullman Company and the Railroad Company were fellow-servants. The court, at page 675, said:

> "Plaintiff can only be regarded as the servant of the Pullman Company, except in the performance of such duties as defendant had the right to direct and control, or of such as pertained to the safety and security of passengers. While merely riding in the Pullman car and looking after the welfare of the passengers therein, he was in no sense a fellow-servant of those operating the engine and train. There was neither a common employer, a common director, nor a common service."

(9) McCLOSKEY vs. CROMWELL, 11 N. Y., 593, at page 599:

> "To employ is to engage in one's service; to use as an agent or substitute in transacting business; to commission or intrust with the management of one's affairs, and when used with respect to a servant or hired laborer, is equivalent to hiring, which implies a request and a contract for compensation, and as to this one, meaning when used in the ordinary affairs and business of life."

After adding our own diligence in research to that of counsel for plaintiff, we are unable to submit to the court any decision, Federal or State, holding that a porter or conductor employed by the Pullman Company, or a messenger employed by any express company, is an employe of the operating railroad company, of whose train the Pullman or express car may be a portion

Second.

A Review of Certain Cases Cited in Brief of Counsel for Plaintiff in Support of Their Contention that Plaintiff was an Employe of the Defendant Railroad.

Counsel for plaintiff have seemingly failed to notice that some of the excerpts made by them and presented in their brief consist of language appearing in decisions where the courts were discussing the degree of care due from a railroad company to employes of the Pullman Company and express companies. In discussing this degree of care they say that the employes of these two companies are not passengers of the railroad company, and are not entitled to that highest possible degree of care to which a common carrier is held for the safety of those who have paid for their transportation as passengers. They also hold that these employes are not trespassers, and that the duty of the railroad company with regard to care and diligence due these employes is analogous to that duty and care which it owes its own employes.

1. PENNA. CO. vs. ROY, 102 U. S., 451:

Here a passenger of the Railroad Company was riding in a Pullman car attached to the train upon which he had taken passage. He was injured by the falling of an upper berth in the sleeping-car, and being a passenger, the court said:

> "As between the parties now before us, it is not material that the sleeping car in question was owned by the Pullman Palace Car Company, or that such Company provided at its own expense a conductor and porter for such car, to whom was committed the immediate control of its interior arrangements. The duty of the Railroad Company was to convey the passenger over its line. In performing that duty, it could not, consistently with the law and the obliga-

> tions arising out of the nature of its business, use cars or vehicles whose inadequacy or insufficiency, for safe conveyance, was discoverable upon the most careful and thorough examination. * * * The law will conclusively presume that the conductor and porter, assigned by the Pullman Palace Car Company to the control of the interior arrangements of the sleeping car in which Roy was riding when injured, exercised such control with the assent of the Railroad Company. *For the purposes of the contract under which the Railroad Company undertook to carry Roy over its line, and, in view of its obligations to use only cars that were adequate for safe conveyance, the sleeping car company, its conductor and porter, were, in law, the servants and employes of the Railroad Company.* Their negligence, or the negligence of either of them, *as to any matters involving the safety or security of passengers while being conveyed,* was the negligence of the Railroad Company."

2. BALTIMORE, &C., R. R. Co. vs. VOIGT, 176 U. S., 498:

Here a statement and question were certified to this Court by the judges of the Circuit Court of Appeals for the Sixth Circuit. The statement sets forth the fact that Voigt, an express messenger, was injured while riding in a car used by his employer, the United States Express Company. A full statement is then made with regard to the contract between the Railroad Company and the Express Company, and between the Express Company and Voigt, which contracts were largely similar to those found in this record.

Following this is the question submitted to this Court, as follows:

> "Does said Railroad Company assume, toward such express messenger, while being carried in the course of his said employment in one of said express cars attached to a passenger train of said Railroad Company, pursuant to the contracts aforesaid, the ordinary liability of a common carrier of passengers for hire so as to render said Railroad Company liable as such to said express messenger, notwithstanding the

contracts aforesaid, for injuries he might sustain by reason of a collision between the train to which said express car is attached and another train of said Railroad Company, caused by the negligence of employes of the Railroad Company?"

At page 512 this Court said:

"It is evident that, by these agreements, there was created a very different relation between Voigt and the railway company than the usual one between passengers and railroad companies. * * *

"The relation of an express messenger to the transportation company, in cases like the present one, seems to us to more nearly resemble that of an employe than that of a passenger. * * * And, of course, if his position was that of a common employe of both companies, he could not recover for injuries caused, as would appear to have been the present case, by the negligence of fellow-servants."

A number of cases are cited and discussed, and the opinion closes with these words:

"Without enumerating and appraising all the cases respectively cited, our conclusion is that Voigt, occupying an express car as a messenger in charge of express matter, in pursuance of the contract between the companies, was not a passenger within the meaning of the case of Railroad Company vs. Lockwood; that he was not constrained to enter into the contract whereby the Railroad Company was exonerated from liability to him, but entered into the same freely and voluntarily, and obtained the benefit of it by securing his appointment as such messenger, and that such a contract did not contravene public policy."

3. O'Brien vs. Chicago, &c., Ry. Co., 116 Fed., 502; 132 Fed., 593; 153 Fed., 511:

O'Brien, an express messenger, was injured by a derailment of the train upon which he was working and brought suit against the railroad company.

In referring to this case, and at page 39 of their brief, counsel for plaintiff make this statement:

> "The express messenger was held to be an employe of the railroad company and entitled to recover under the Iowa Employers' Act."

This language is used in connection with the opinion of the District Judge on demurrer filed by O'Brien to those portions of the railroad's answer which set up the contracts between the express company and the railroad, and O'Brien and the express company.

Nowhere in this, or in the two subsequent opinions rendered in this cause, do we find support for the language that O'Brien "was held to be an employe of the railroad company."

In the first opinion, 116 Fed., at page 507, the court set out the sections of the Iowa Code upon which the plaintiff based his demurrer, and which are as follows:

> "SEC. 2071. Liability for Negligence or Wrongs of Employes: Every corporation operating a railway shall be liable for all damages sustained by any person, including employes of such corporation, in consequence of the neglect of the agents, or by any mismanagement of the engineers or other employes thereof, and in consequence of the wilful wrongs, whether of commission or omission, of such agents, engineers, or other employes, when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding."
>
> "SEC. 2074. Contract or Rule Limiting Liability: No contract, receipt, rule or regulation shall exempt any railway corporation engaged in transporting persons or property from the liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule or regulation been made or entered into."

Chapter 49:

> "That section numbered two thousand and seventy-one (2071) of the Code be amended by adding at the end thereof the following: Nor shall any contract of insurance, relief, benefit, or indemnity in case of injury or death entered into prior to the injury, between the person so injured and such corporation, or any other person or association, acting for such corporation, nor shall the acceptance of any such insurance, relief, benefit, or indemnity by the person injured, his widow, heirs, or legal representatives, after the injury from such corporation, person, or association, constitute any bar or defense to any cause of action brought under the provisions of this section, but nothing contained herein shall be construed to prevent or invalidate any settlement for damages between the parties subsequent to injuries received."

Following this statement of the law of Iowa the court said, at page 508:

> "By the provisions of section 2071, the railway companies are declared *to be liable to any person*, including their employes, for injuries resulting from the neglect, mismanagement, or wilful wrongs of the servants or agents of the company connected with the operation of the railways. * * * The messenger is therefore rightfully in the car, with the knowledge of the railway company, and the company, under the general rule of the common law, is bound to use ordinary care in the transportation of the express car, because it has agreed that the messenger shall be transported in that car, and, as the car is wholly under its control and management, it owes to the messenger the duty of exercising ordinary care to protect him from injuries arising from carelessness in the transportation of the car by the railway company. In addition to the obligation imposed by the common law, section 2071 of the Code of Iowa declares that a railway company shall be liable for all damages *sustained by any person* resulting from the neglect or mismanagement of any servant, agent, or

> employe of the company in connection with the operation of the railway. In Rose vs. Railway Co., 39 Iowa, 246, the State Supreme Court, in construing this statutory provision, held that it could not be limited to employes only, but that 'the language of the enactment includes all classes of persons sustaining damages from the negligence of the employes of the railroad company.' "

After discussing the contracts and the sections of the Iowa Code applicable to this cause the court, at page 509, says:

> "Thus it is declared by the statutory enactment to be the public policy of the State that corporations engaged in the railway business in this State cannot, by contract, free themselves from the liability attaching to them as carriers of passengers and property; that they are *liable to every person*, including their own employes, for injuries resulting from the neglect, mismanagement, or wilful wrongs of the agents or employes of the company engaged in the operation of the railway, and that no contract seeking to restrict such liability shall be legal or binding;"

The trial of this cause resulting in a judgment for the plaintiff, and on the appeal of the railroad company, 132 Fed. Rep., 593, and at page 595, the Circuit Court of Appeals, Eighth Circuit, speaking through Circuit Judge Hook, said:

> "The deceased did not, while upon the train in the performance of his duties as an express messenger, sustain to the railway company the relation of a passenger, and he was not, therefore, entitled to that highest possible degree of care to which a common carrier is held for the safety of those who have paid for their transportation as passengers. Neither was the express messenger a mere licensee. He was not upon the train at the mere sufferance of the railway company, but he was engaged thereon in the performance of duties which had connection with its business of transportation, and which would naturally have been performed by its own employes had it not been otherwise arranged by contract with the express com-

> pany. His relation to the railway company *was analogous* to that of one of its own employes. Railway Company vs. Voigt, 176 U. S., 498. The measure of care which the railway company owed him in respect of its track, engine, cars, and the operation of its train was the same which it owed *to those in its immediate service.*"

In the same case, 153 Fed. Rep., pages 511 and 512, the same court, speaking again through Circuit Judge Hook, said:

> "This is the second appearance of this case in this court. When it was first here, a judgment in favor of the plaintiff was reversed because the trial court refused to instruct the jury that negligence could not be inferred from the fact of accident in an action for the death of one who was not a passenger, but whose relation to the defendant *was analogous to that of an employe and governed by the same principles.*"

There was no necessity in this case for the court to determine the question as to whether or not O'Brien was an employe of the railroad company, for the language of the Iowa Statute was broad and inclusive and protective of everyone, whether employe or not, who sustained damage in consequence of the neglect, mismanagement, &c., of the railroad's employes, and it made void all contracts exempting the railroad company, whether that contract was made by a passenger, an employe, a licensee or other person. It denied to the railroad company, in other words, the right to exempt itself from the common-law liability of a common carrier.

4. The Oliver Case.

OLIVER VS. NORTHERN PACIFIC RAILROAD COMPANY, 196 Fed. Rept., 432:

Action was brought by the administratrix of the estate of John A. Oliver, deceased, to recover damages from the defendant Railroad Company for his death, caused by the alleged negligence and wrongful act of defendant.

Oliver at the time of the accident was a porter on a sleeping car (one of fifty) *owned jointly* by the Pullman Company and the defendant Railroad Company, and which fifty cars were, under the terms of the contract between the Pullman Company and the defendant Railroad Company, known and operated as Association Cars. The Pullman Company, as agent for the Association, had management of these cars, but the contract especially provided (p. 435, opinion, *supra*):

> "* * * *The Association* shall furnish with each such sleeping cars, one or more employes, as may be required, whose duties shall be to collect fares from passengers occupying such cars, for the use of seats or berths, and generally to wait upon and provide for the comfort of passengers therein; such employes at all times to be subject to the rules of the railroad company governing its own employes. *The Association* shall also furnish employes who shall have charge of all the sleeping cars used under this contract."

Provision was made for a division of the profits, after deducting operating expenses of these Association Cars, which operating expenses included compensation paid to employes used on the cars.

At pages 435 and 436 the court said:

> "The relations existing between the Railway Company and the Pullman Company in this case, and consequently the relations existing between the Railway Company and the porter on the Pullman car, *differ widely* from those disclosed in the numerous cases cited in argument, where it was held that a porter on a Pullman car was not an employe of the railroad company over whose tracks the Pullman car was operated. * * *
>
> "It will thus be seen that the Railway Company was the owner of a half interest in the Pullman car upon which the deceased porter was employed, and that the deceased was employed by an Association of which the Railway Company was a part. True, the Pull-

> man Company was the manager for the Association, but in that respect it was simply an agent for the Railway Company. Stripped of matters of mere form, the Railway Company and the Pullman Company operated this car jointly for their joint benefit, *and employed the porter jointly.* * * * The question then arises, Is a person *employed jointly* by a railway company and another company in the operation and management of a train an employe of the railway company, within the meaning of the Employers' Liability Act? In my opinion this question must be answered in the affirmative."

With the conclusion thus reached by the court we have no contest. The opinion recognizes without criticism or question decisions holding that a Pullman porter is not an employe of the transporting railroad company in cases where the facts were similar to those at this bar. It recognizes distinctly, and states with marked clearness and force, the difference in facts and the necessary difference in judicial finding based upon this variance of fact. The car was owned in half by the Railway Company, operated by an association or a partnership owned in half by the Railway Company, the porter employed for the benefit of this association, working for it, and paid entirely by it.

In the case at bar the car was owned entirely by the Pullman Company, the porter employed alone by the Pullman Company for the benefit of the Pullman Company and its passengers, and paid by the Pullman Company—and its passengers.

This opinion in no form, not even by indirection, criticises or calls in question the propriety of court decisions holding that the ordinary porter on a Pullman car is not an employe of the operating Railroad Company, but apparently recognizes the abundant propriety of these decisions, and is an authority supporting defendant's position herein.

In some States the courts of last resort hold that Pullman porters and express messengers are passengers, and that the

operating railroad must respond to them, as to other passengers, for injury caused by negligence of the road or its employes. This is directly opposed to the law as declared by this court.

> Baltimore & Ohio, etc., Ry. Co. vs. Voigt, 176 U. S., 498.
>
> Santa Fe, etc., Ry. Co. vs. Grant, 228 U. S., 177, at 186.

But, as above stated, we have found no Federal or State decision holding that a Pullman porter, or an express messenger, is an employe of the operating railroad company.

Third.

Plaintiff Was Not an Employe of Both the Pullman Company and Defendant Railroad Company.

At pages 43-54, inclusive, of their brief, counsel for plaintiff contend that plaintiff was an employe of the defendant, first, "Because the contract between the two companies created a partnership," and second, they say that plaintiff was *pro hac vice* an employe of the defendant railroad.

As to the first point, we simply refer to the contract itself (Record, pages 27-30, inclusive).

As to the second point, we submit that if plaintiff was "on this occasion," at the time of the accident, an employe of defendant, he was at all times its servant. At the time of the accident, plaintiff was sitting in a seat in the Pullman car, ready to respond to any demand of its passengers, and in no way rendering any service whatever that the railroad, as a common carrier, must render to the public. Counsel in support of this last point cite Standard Oil Company vs. Anderson, 212 U. S., and quote therefrom, at page 221, as follows:

> "It sometimes happens that one wishes a certain work to be done for his benefit, and neither has per-

> sons in his employ who can do it, nor is willing to take such persons into his general service. He may then enter into an agreement with another. If that other furnishes him with men to do the work, *and places them under his exclusive control in the performance of it,* those men become *pro hac vice* the servants of him to whom they are furnished."

We continue the quotation:

> "But on the other hand, one may prefer to enter into an agreement with another that that other, for a consideration, shall himself perform the work, through servants of his own selection, retaining the direction and control of them. In the first case, he to whom the workmen are furnished is responsible for their negligence in the conduct of the work, because the work is his work, and they are for the time his workmen. In the second case, he who agrees to furnish the completed work, through servants over whom he retains control, is responsible for their negligence in the conduct of it, because, though it is done for the ultimate benefit of the other, it is still, in its doing, his own work."

The language just quoted states the position of the defendant in this case. The Railroad Company entered into an agreement with the Pullman Company, under which the Pullman Company was to perform certain work through servants of its own selection, and over whom it retained direction and control. Under the agreement between the Pullman Company and the defendant railroad, above cited, the Pullman Company agreed to furnish sleeping and parlor cars, properly equipped and sufficient in number; to keep these cars in good repair and order; to furnish the necessary employes with same, and to furnish inspectors to supervise the conduct of these employes, the cleanliness of the cars, etc., and with the right reserved to the Pullman Company to collect from the occupants of these cars such fares as are customary for the use of seats and berths therein. Under the principle decided in Standard Oil Company vs. Ander-

son, above, the plaintiff was the servant of the Pullman Company and not the Railroad Company; for it determined whose servant the employe, guilty of the negligence which caused the injury to Anderson, was, and held that he was the employe of the Standard Oil Company, although at the time the negligence, which produced the injury to Anderson, occurred, he was discharging certain duties in connection with work being done for the Standard Oil Company by another, and was to a certain extent subject to signals and orders given by the other.

The defense of the Standard Oil Company was based upon the claim that at the time the negligence occurred, the employe guilty of same, though its general servant, was in the employment and under the control of another.

An examination of the other cases cited in connection with this branch of the argument shows any discussion of them unnecessary. But at page 54 counsel for plaintiff urge that because the plaintiff sometimes collected from passengers on the train both the railroad tickets and the Pullman fares this service made him an employe of the Railroad Company.

The record discloses that the sleeping car conductor would retire at three o'clock in the morning, after the train passed Fairmont, West Virginia; after this time, and until the train reached Wheeling, some three hours later, if a passenger boarded the Pullman car and desired to retire immediately and before the train conductor came back into the Pullman, the porter would take up his Pullman ticket and punch it, and also take the train ticket, put it in an envelope and hold it until he could deliver it to the train conductor when he came back into the car. That the porter had no punch with which to mark or cancel the train ticket. This service was rendered, in fact, for the accommodation of the Pullman passenger, to prevent him from being disturbed and awakened by the train conductor coming into the Pullman car after the passenger had retired.

There was no rule or regulation of either the Pullman Company or the Railroad Company introduced in evidence

showing this to be a part of the duty of the porter. It may have been an accommodation to the train conductor, but it certainly was in furtherance of the comfort and rest of the Pullman passenger.

We presume it will hardly be contended that such service, absolutely voluntary, rendered by the Pullman porter, first to a Pullman passenger, and for the accommodation and comfort of that passenger, and without the knowledge, so far as this record discloses, of the Railroad Company, transformed the Pullman employe into a Railroad employe.

If this is sufficient to impress the plaintiff with the characteristics of an employe of the Railroad Company, then there must be a recasting of legal principles and court decisions, declaring what are the fundamentals upon which the relation of master and servant, employer and employe, rest; for this relation is presumed to be based upon contract, the one bound to render service, the other to pay the stipulated compensation, or a reasonable compensation, with the right in the employer to select the employe, to remove and discharge him, and to direct both what work shall be done and the way and manner in which it shall be done.

At the time of the accident the porter was not even rendering this service, for Fairmont had not been reached, the Pullman conductor had not retired, and the plaintiff, using his own language, was not a "porter in charge."

Fourth.

The Trial Court Committed No Error in Allowing the Contract Between the Plaintiff and the Pullman Company to be Received in Evidence.

Defendant filed two pleas (Record, pages 7-9) to the declaration herein; first, the plea of "Not guilty," and second, an additional plea, setting up the contracts between the Pullman Company and the defendant Railroad Company, and

the Pullman Company and plaintiff, following, in this, the pleading in the Voigt case, *supra*.

A demurrer was filed by plaintiff to the additional plea and sustained by the court, and at the trial the only plea upon which defendant stood, or could stand, was the general issue plea of "Not guilty."

At the trial plaintiff testified in chief that he was a porter of the Pullman Company, and the contract between the Pullman Company and the defendant railroad was introduced by plaintiff's counsel.

On cross-examination the contract between the plaintiff and the Pullman Company was offered by the defendant and over plaintiff's objection admitted.

In this the court committed no error, for under the not guilty plea this testimony is competent.

Brown vs. Railroad Company, 6 App. D. C., at page 242.

Schafer vs. Stonebraker, 4 Gill & Johnson (Md.), at page 247, or side pages 355, 356, in volume containing reports 4 and 5.

Nor was there error in admitting it on cross-examination.

The order of testimony, both as regards the examination of a particular witness and the general course of the trial, is ordinarily within the discretion of the court. And in this matter the authorities are distinct as to the right of the defendant to introduce such a paper during the examination of witnesses for the plaintiff or of the plaintiff himself.

The Philadelphia Co. vs. Stimpson, 14 Peters, 448.

Tietz vs. Tietz, 90 Wis., 66.

Patton vs. Fox, 179 Mo., 533.

Question of Defendant's Negligence in Connection with the Accident.

The testimony fails to disclose the specific and necessary negligence on the part of the defendant, or its employes, which caused the accident and consequent injuries to plaintiff.

Under the decisions, it is essential that this should be done. This burden rested upon the plaintiff, because he was not a passenger in the sense that after such an accident is proven the burden shifts to the defendant railroad. An accident may speak for itself in a suit brought by a passenger, but not in an action like this. The accident may have been the result of negligence, but the record fails to disclose what the specific negligence was.

In Hughson vs. Railroad Company, 2 App., D. C., 98, the plaintiff, Hughson, was a Pullman porter, who sued the Railroad Company for injuries caused by the alleged negligence of its employes, and at page 103, the Court said:

> "But though the plaintiff was not a servant of the Railroad Company, and, therefore, not a co-servant with the employes of that company, and consequently not subject to the principle of non-liability of the master for the negligence of his servant producing an injury to a fellow-servant, yet the plaintiff was not a passenger in any such sense as to require of the Railroad Company the highest degree of skill and care in the construction and maintenance of its roadway and machinery, and the operation of its road and the running of its trains, such as are required in the case of a passenger. Nor will the principle apply in such case as this, which applies in the case of a passenger, that negligence is presumed *prima facie*, from the simple fact of the occurrence of the accident and the infliction of injury, imposing the onus upon the defendant of showing the absence of negligence. Stokes vs. Saltonstall, 13 Pet., 181. But in a case of the nature of the pres-

ent, the onus of proof is upon the plaintiff to show affirmatively that the injury he suffered was occasioned by the want of the exercise of ordinary, reasonable care by the defendant or its servants. The plaintiff must, at least, be supposed to understand the nature and risks of the employment, and that he assumed the risks of ordinary accidents in the course of the employment; and the condition of his right to recover of the Railroad Company, for an injury received in an accident, is, that he can show affirmatively that the injury was caused by the want of ordinary care and diligence on the part of the Railroad Company or its employes."

Conclusion.

If plaintiff is not an employe of defendant railroad, the release executed by him when he entered the service of the Pullman Company stands as an absolute bar to the successful maintenance of his suit.

The Employers' Liability Act, relied upon by plaintiff, is expressly limited in its scope and reach, both as to the class of carriers whose liabilities are increased, and as to the class benefited under its provisions.

> "In order to bring the case within the terms of the Federal Act (35 Stats. at L., 65, Chap. 149; U. S. Comp. Stats. Supp. 1911), defendant must have been, at the time of the occurrence in question, engaged as a common carrier in interstate commerce, and plaintiff's intestate must have been employed by said carrier in such commerce."
>
> North Carolina R. R. Co. vs. Zachary, 232 U. S., at page 256.

If plaintiff was an employe of the defendant railroad, then the contract entered into between him and the Pullman Company, containing the release relied upon, may be void, so far as the effect of the release is concerned, under Section 5, of the Employers' Liability Act; otherwise the release is a defense and bar to his suit.

In view of the language of the Act and its specific limitations, and under the authority of the unbroken line of decisions, cited herein and relied upon, and all holding that Pullman employes and express messengers are not employes of the operating railroad company, we respectfully ask that the judgment below be affirmed.

GEORGE E. HAMILTON,
JOHN J. HAMILTON,
JOHN W. YERKES,
Attorneys for Defendant in Error.

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ROBINSON *v.* BALTIMORE AND OHIO RAILROAD COMPANY.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 167. Argued March 3, 4, 1915.—Decided April 5, 1915.

In a suit for personal injuries under the Employers' Liability Act, a contract between the plaintiff and a third party may be admissible in evidence on the trial to show that plaintiff was not defendant's employé even though a demurrer had been sustained to a special plea that the contract contained a release of liability.

A contract between the Pullman Company, as employer, and its employé releasing the employer, and also all railroad corporations over

whose lines the employer's cars were operated, from all claims for liability in personal injury sustained by the employé, *held* in this case valid unless the employé of the Pullman Company was also the employé of the railroad company, in which case that provision of the contract would be invalid under § 5 of the Employers' Liability Act.

Congress in legislating on the subject of carriers by rail was familiar with the situation and used the term employé in its natural sense and did not intend to include as employés of the carrier persons on interstate trains engaged in various services for other masters.

40 App. D. C. 169, affirmed.

THE facts, which involve the construction of the Federal Employers' Liability Act and its application to employés of others than the carrier, are stated in the opinion.

Mr. Levi H. David, with whom *Mr. Alexander Wold* was on the brief, for plaintiff in error:

Plaintiff was an employé of the railroad company either as a matter of law or of fact, and whether he was in the employ, jointly and severally, of the railroad company and the Pullman Company, he was entitled to have his case submitted to the jury under the Employers' Liability Act of 1908. *Pennsylvania Co.* v. *Roy*, 102 U. S. 451; *Williams* v. *Car Co.*, 40 La. Ann. 417; *Thorpe* v. *Railroad Co.*, 76 N. Y. 402; *Dwinelle* v. *Railroad*, 120 N. Y. 117; *Louisville R. R.* v. *Katzenberger*, 16 Lea, 380; *Railroad Co.* v. *Lillie*, 112 Tennessee, 341; *Railroad Co.* v. *Ray*, 101 Tennessee, 10; *Balt. &. Ohio So. W. Ry.* v. *Voigt*, 176 U. S. 498, 520; *O'Brien* v. *Chicago & N. W. Ry.*, 116 Fed. Rep. 502; *S. C.*, affirmed on new trial, 132 Fed. Rep. 593; *S. C.*, 153 Fed. Rep. 511.

The joint business relations between the Pullman Company and the Baltimore & Ohio Railroad Company, as disclosed by the written contract offered in evidence in this case, are closer than the relations existing between the express company and the railroad company shown to exist in the *Voigt Case*.

Plaintiff in error was an employé of both corporations.

The contract between the two companies creates a partnership. *Balt. & Ohio So. W. Ry.* v. *Voigt, supra; Oliver* v. *Nor. Pac. Ry.*, 196 Fed. Rep. 432; *Ward* v. *Thompson*, 22 How. 330.

Where there is any partnership arrangement between two masters (*e. g.*, two railroad companies), wherein a servant is employed for the common business of both, the servants of either master will become fellow-servants. McKinney on Fellow Serv., p. 46; *Railroad* v. *Schneider*, 45 Ohio St. 678; *Swainson* v. *Railroad*, L. R., 3 Exch. Div. 341.

Employment and payment of a person are not indispensable elements to create the relation of master and servant. *D. & R. G. R. R. Co.* v. *Gustafson*, 21 Colorado, 393; *Gaines* v. *Bard*, 57 Arkansas, 615.

Plaintiff in error became *pro hac vice* employé of the railroad company.

The general servant of one person may, for a time or on a particular occasion, become the servant of another by submitting himself, either expressly or impliedly, to the control and direction of the other. *Standard Oil Co.* v. *Anderson*, 212 U. S. 215; *Brooks* v. *Central Sainte Jeanne*, 228 U. S. 688; *Morgan* v. *Smith*, 159 Massachusetts, 571; *Hasty* v. *Sears*, 157 Massachusetts, 123; *Johnson* v. *Lindsay*, L. R. App. Cas. (1891), 371; *Rourke* v. *Colliery Co.*, L. R., 2 C. P. Div. 205; *McDowell* v. *Company*, 28 N. Y. Supp. 821; *Wyllie* v. *Palmer*, 137 N. Y. 248; *Kimball* v. *Cushman*, 103 Massachusetts, 194; *Brown* v. *Smith*, 86 Georgia, 274; *Clapp* v. *Kemp*, 102 Massachusetts, 481; *Murray* v. *Currie*, L. R., 6 C. P. Div. 24; *Railroad Co.* v. *Jones*, 12 S. W. Rep. (Tex.) 972; *Railroad* v. *Schneider*, 45 Ohio St. 678; *Westover* v. *Hoover* (Neb.), 129 N. W. Rep. 285; Thomp. on Neg. (2d ed.), § 3742; *M., K. & T. Ry.* v. *Reasor*, 28 Tex. Civ. App. 302; *Vary* v. *B. C. R. & M. R.*, 42 Iowa, 246; *Hannegan* v. *Union Warehouse Co.*, 38 N. Y. Supp. 272; *Mound*

City Co. v. *Conlon*, 92 Missouri, 229; *Atkyn* v. *Wabash Ry.*, 41 Fed. Rep. 193.

If the uncontradicted evidence of plaintiff did not show him to have been an employé of defendant, or the employé of both defendant and the Pullman Company, as a matter of law, the evidence was sufficient to be submitted to the jury. *Northwestern Packet Co.* v. *McCue*, 17 Wall. 508; *Mo., Kans. & Tex. Ry.* v. *West*, 232 U. S. 682; *Tenn. &c. R. R.* v. *Hayes*, 97 Alabama, 201; *Dwinelle* v. *N. Y. C. & H. R. R.*, 120 N. Y. 118; *Sacker* v. *Waddell*, 98 Maryland, 50.

Plaintiff in error was not a volunteer in the collection of railroad transportation from its passengers. *Brooks* v. *Central Sainte Jeanne*, 228 U. S. 688; *Pullman Car Co.* v. *Lee*, 49 Ill. App. 77.

The alleged release was no bar. *Standard Oil Co.* v. *Anderson*, 212 U. S. 221; *Voigt Case, supra; O'Brien* v. *Chicago &c. Ry.*, 116 Fed. Rep. 502.

Negligence of the defendant was shown. *Nor. Pac. Ry.* v. *Mix*, 121 Fed. Rep. 476; *Hayes* v. *Michigan Central R. R.*, 111 U. S. 241; *Great Northern Ry.* v. *Sloan*, 196 Fed. Rep. 275; *Pennsylvania R. R.* v. *Goughnour*, 208 Fed. Rep. 961.

The evidence of the defendant's negligence should have been submitted to the jury. *Tex. & Pac. Ry.* v. *Gentry*, 163 U. S. 353; *Chic. & N. W. Ry.* v. *O'Brien*, 82 C. C. A. 461; *Hough* v. *Texas & Pac. Ry.*, 100 U. S. 213; *Nor. & West. Ry.* v. *Earnest*, 229 U. S. 114; *Grand Trunk Ry.* v. *Lindsay*, 233 U. S. 42.

The Pullman car is not a vehicle of a common carrier independent of the railroad company. *Robinson* v. *Southern Ry.*, 40 App. D. C. 549; *Pickard* v. *Pullman Car Co.*, 117 U. S. 34.

The status of sleeping-car companies operated in connection with railway trains is not that of a carrier of goods or passengers, *Lemon* v. *Pullman Car Co.*, 52 Fed. Rep. 262;

Meyer v. *St. Louis &c. Ry.*, 54 Fed. Rep. 116; nor is it that of an innkeeper. *Blum* v. *Pullman Car Co.*, 1 Flipp. (U. S.) 500; *Pullman Car Co.* v. *Lawrence*, 74 Mississippi, 782; *Nevin* v. *Pullman Car Co.*, 106 Illinois, 222; Hutchinson on Carriers (ed. 1906), §§ 1130, 1136; *Pullman Car Co.* v. *Taylor*, 65 Indiana, 153; *Pullman Car Co.* v. *Pollock*, 69 Texas, 123; *Louis. & Nash. R. R.* v. *Katzenberger*, 16 Lea (Tenn.), 380; *Dwinelle* v. *N. Y. C. & H. R. R.*, 120 N. Y. 117; *P., C. & S. L. Ry.* v. *Krouse*, 30 Oh. St. 224.

Mr. John W. Yerkes, with whom *Mr. George E. Hamilton* and *Mr. John J. Hamilton* were on the brief, for defendant in error:

The plaintiff was not an employé of the defendant railroad, and therefore not a beneficiary of any of the provisions of the Employers' Liability Act.

The cases cited in brief for plaintiff, to the effect that plaintiff was an employé of the defendant railroad, do not sustain that contention.

Plaintiff was not an employé of both companies.

The trial court did not err in admitting in evidence contract between plaintiff and Pullman Company.

Defendant's negligence in connection with the accident was not shown.

In support of these contentions see *Balt. & Ohio R. R.* v. *Voigt*, 176 U. S. 498; *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S. 36; *Brown* v. *Railroad Co.*, 6 App. D. C. 242; *Chicago &c. R. R.* v. *Hamler*, 215 Illinois, 525; *Davis* v. *Ches. & Ohio Ry.*, 5 L. R. A. (N. S.) 458; *Denver &c. R. R.* v. *Whan*, 11 L. R. A. (N. S.) 432; *Hughson* v. *Richmond & Danville R. R.*, 2 App. D. C. 98; *Jones* v. *St. Louis &c. Ry.*, 125 Missouri, 666; *McCloskey* v. *Cromwell*, 11 N. Y. 593; *McDermon* v. *Southern Pacific Co.*, 122 Fed. Rep. 669; *Missouri &c. R. R.* v. *Blalack*, 105 Texas, 297; *Missouri &c. R. R.* v. *West*, 134 Pac. Rep. 655; *North Car. R. R.* v. *Zachary*, 232 U. S. 256; *O'Brien* v. *Chicago &c. Ry.*, 116

Fed. Rep. 502; *S. C.*, 132 Fed. Rep. 593; *S. C.*, 153 Fed. Rep. 511; *Oliver* v. *Nor. Pac. R. R.*, 196 Fed. Rep. 432; *Patton* v. *Fox*, 179 Missouri, 533; *Penna. Co.* v. *Roy*, 102 U. S. 451; *M., K. & T. R. R. Co.* v. *West*, 232 U. S. 682; *Santa Fe &c. Ry.* v. *Grant*, 228 U. S. 177; *Schafer* v. *Stonebraker*, 4 Gill & Johnson (Md.), 355; *Shaw* v. *Railroad Co.*, 101 U. S. 565; *Standard Oil Co.* v. *Anderson*, 212 U. S. 221; *Philadelphia Co.* v. *Stimpson*, 14 Pet. 448; *Tietz* v. *Tietz*, 90 Wisconsin, 66.

See also Employers' Liability Act of 1908, 35 Stats. 65, 149; Iowa Employers' Act, Iowa Code, §§ 2071, 2074; Missouri Fellow-Servants' Law, § 2876, Rev. Stat. of Missouri, 1899.

MR. JUSTICE HUGHES delivered the opinion of the court.

George R. Robinson, the plaintiff in error, brought this action to recover damages for personal injuries sustained by him while performing his duty as a porter in charge of a Pullman car which was being hauled by the defendant as a part of an interstate train. The injuries were received in a collision which was due, it was alleged, to the defendant's negligence. The defendant introduced in evidence the plaintiff's contract of employment [1] with the Pullman

[1] The material portions of the contract are as follows:

"Be it known, That I, the undersigned, hereby accept employment by, and enter into, or continue from this date, in the service of, The Pullman Company upon the following express terms, conditions and agreements, which in consideration of such employment and the wages thereof I do hereby make with said The Pullman Company, to wit:

"First. So long as I shall remain in said employment and service, I will fully comply with all regulations, rules and orders of said Company or its agents, issued for the government of its employés, go wherever I may be required in said service, and well, faithfully and honestly perform all duties assigned to me.

"Second. My wages shall at all times be calculated and paid at the monthly rate per day for the number of days I shall have been actually

Company, by which he released all railroad corporations over whose lines the cars of that company might be operated while he was traveling in its service 'from all claims for liability of any nature or character whatsoever on account of any personal injury or death.' The trial court directed a verdict in favor of the defendant and the judg-

employed, and I may quit or resign, or may be suspended or discharged from such employment and service, at any time, or at any place, without previous notice. . . .

"Fourth. I assume all risks of accidents or casualties by railway travel or otherwise, incident to such employment and service, and hereby, for myself, my heirs, executors, administrators or legal representatives, forever release, acquit and discharge The Pullman Company, and its officers and employés, from any and all claims for liability of any nature or character whatsoever, on account of any personal injury or death to me in such employment or service.

"Fifth. I am aware that said The Pullman Company secures the operation of its cars upon lines of railroad, and hence my opportunity for employment, by means of contracts, wherein said The Pullman Company agrees to indemnify the corporations or persons owning or controlling such lines of railroad against liability on their part to the employés of said The Pullman Company in cases provided for in such contracts, and I do hereby ratify all such contracts made or to be made by said The Pullman Company and do agree to protect, indemnify and hold harmless said The Pullman Company with respect to any and all sums of money it may be compelled to pay, or liability it may be subject to, under any such contract, in consequence of any injury or death happening to me, and this agreement may be assigned to any such corporation or person and used in its defense.

"Sixth. I will obey all rules and regulations made or to be made for the government of their own employés by the corporations or persons over whose lines of railroad the cars of said The Pullman Company may be operated while I am traveling over said lines in the employment or service of said The Pullman Company; and I expressly declare that while so traveling I shall not have the rights of a passenger with respect to such corporations or persons, which rights I do expressly renounce; and I hereby, for myself, my heirs, executors, administrators or legal representatives, forever release, acquit and discharge any and all such corporations and persons from all claims for liability of any nature or character whatsoever on account of any personal injury or death to me while in said employment or service."

ment, entered accordingly, was affirmed by the Court of Appeals. 40 App. D. C. 169.

The plaintiff in error complains of the admission of the contract in evidence, in view of the fact that a demurrer to a special plea setting up the release had been sustained; but, if the contract was a defense, it cannot be said that the court erred in giving effect to it, despite the earlier ruling. The evidence was admissible under the plea of not guilty. *Brown* v. *Balt. & Ohio R. R.*, 6 App. D. C. 237, 242; *Shafer* v. *Stonebraker*, 4 Gill & J. (Md.) 345, 355, 356; *Johnson* v. *Philadelphia &c. R. R.*, 163 Pa. St. 127, 133. It is also clear that, unless condemned by statute, the contract was a valid one and a bar to recovery. *Balt. & Ohio &c. Rwy.* v. *Voigt*, 176 U. S. 498; *Sante Fe &c. Rwy.* v. *Grant Co.*, 228 U. S. 177.

The substantial question is whether the contract of release was invalid under § 5 of the Employers' Liability Act, of April 22, 1908, c. 149, 35 Stat. 65, which provides that 'any contract . . . the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void.' The application of this provision depends upon the plaintiff's employment. For the 'liability created' by the Act is a liability to the 'employés' of the carrier, and not to others; and the plaintiff was not entitled to the benefit of the provision unless he was 'employed' by the Railroad Company within the meaning of the Act. It will be observed that the question is not whether the Railroad Company, by virtue of its duty to passengers of which it cannot divest itself by any arrangement with a sleeping car company, would not be liable for the negligence of a sleeping car porter in matters involving the passenger's safety (*Pennsylvania Co.* v. *Roy*, 102 U. S. 451). Nor are we here concerned with the measure of the obligation of the Railroad Company, in the absence of special contract, to one in the plaintiff's situation by

reason of the fact that he was lawfully on the train, although not a passenger. The inquiry rather is whether the plaintiff comes within the statutory description, that is, whether upon the facts disclosed in the record it can be said that within the sense of the Act the plaintiff was an employé of the Railroad Company, or whether he is not to be regarded as outside that description being, in truth, on the train simply in the character of a servant of another master by whom he was hired, directed and paid, and at whose will he was to be continued in service or discharged.

The contract between the Pullman Company and the Railroad Company was introduced in evidence. Without attempting to state its details, it is sufficient to say that the case was not one of co-proprietorship (see *Oliver* v. *Northern Pacific R. R.*, 196 Fed. Rep. 432, 435). It appeared that there was supplied by the Pullman Company on its own cars a distinct and separate service which was performed by its own employés under its own management. For this service the Pullman Company charged its customary rates. It was provided that the Railroad Company should not receive compensation from the Pullman Company for the movement of cars furnished under the contract nor should the Pullman Company be paid for their use. But whenever the gross revenue from sales of seats and berths in the Pullman cars exceeded an average of $7,750 per car per annum the Pullman Company was to pay to the Railroad Company one-half of the excess; and if the average gross revenue from the Pullman cars (from causes beyond the control of the Pullman Company) was less than $6,000 per car per annum for two consecutive years that company was entitled to terminate the agreement upon twelve months' notice, with the option, however, on the part of the Railroad Company, to pay to the Pullman Company such sum as would bring the gross revenue up to the specified amount or to purchase the cars at a price to be determined. We think it to be

clear that in employing its servants the Pullman Company did not act as the agent of the Railroad Company. The service provided by the Pullman Company was, it is true, subject to the exigencies of railroad transportation, and the Railroad Company had the control essential to the performance of its functions as a common carrier. To this end the employés of the Pullman Company were bound by the rules and regulations of the Railroad Company. This authority of the latter was commensurate with its duty, and existed only that it might perform its paramount obligation.

With this limitation, the Pullman Company supplied its own facilities and for this purpose organized and controlled its own service, including the service of porters; it selected its servants, defined their duties, fixed and paid their wages, directed and supervised the performance of their tasks, and placed and removed them at its pleasure. See *Hughson* v. *Richmond & Danville R. R.*, 2 App. D. C. 98; *McDermon* v. *Southern Pacific Co.*, 122 Fed. Rep. 669; *Jones* v. *St. Louis &c. Rwy.*, 125 Missouri, 666; *Chicago &c. R. R.* v. *Hamler*, 215 Illinois, 525. It is said that the plaintiff had been promoted to be a 'porter in charge' of the Pullman car between Washington and Wheeling, with increased compensation, but he still was the porter of the Pullman Company, employed in its work. It is insisted that he should be regarded as the employé of the Railroad Company because of the fact that in the case of passengers coming on the train after three o'clock in the morning, he received the railroad ticket or fare which he placed in an envelope and gave to the train conductor 'when he came back'; the railroad ticket was punched or canceled by the conductor. This, however, was an obvious accommodation to the passenger in the Pullman car, and in any event it was merely an incidental matter which cannot be deemed to qualify the character of plaintiff's employment as it is to be viewed from the standpoint of the statute.

We are of the opinion that Congress used the words 'employé' and 'employed' in the statute in their natural sense, and intended to describe the conventional relation of employer and employé. It was well known that there were on interstate trains persons engaged in various services for other masters. Congress, familiar with this situation, did not use any appropriate expression which could be taken to indicate a purpose to include such persons among those to whom the railroad company was to be liable under the Act.

We conclude that the plaintiff in error was not an employé of the defendant company within the meaning of the Employers' Liability Act, and that the judgment must be affirmed.

Judgment affirmed.